(1)

No. 03-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals erred in extending the "revenue rule" to bar claims brought under U.S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States.

PARTIES TO THE PROCEEDING

The Petitioners in the case of the EC and Member States are the European Community, Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain. The action was originally brought against RJR Nabisco, Inc., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., RJR Acquisition Corp. (formerly known as Nabisco Group Holdings Corp.), R.J. Reynolds Tobacco Holdings, Inc., Philip Morris International, Inc., Philip Morris Companies, Inc., Philip Morris Incorporated (doing business as Philip Morris Products, Inc.), and Philip Morris Duty Free, Inc. In the Second Circuit, the World Health Organization, the Federal Law Enforcement Officers Association, and the National Campaign for Tobacco Free Kids all appeared as *amici* supporting the principle that American courts should be open to foreign governments in this case.[1]

The Petitioners in the case of the Departments of the Republic of Colombia are the Departments of Amazonas, Antioquia, Atlantico, Bolivar, Boyaca, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte de Santander, Putamayo, Quindio, Risaralda, Santander, Sucre, Tolima, Valle del Cauca, and Vaupes, and Santa Fe de Bogota, D.C. The case was brought against British American Tobacco (Investments) Limited, BAT Industries plc, Brown & Williamson Tobacco Corporation, BATUS Tobacco Services, Inc., and British

1. The EC and Member States commenced a separate action against Japan Tobacco, Inc., JT International Manufacturing America, Inc., JTI Duty Free USA, Inc., JT International S.A., Japan Tobacco International U.S.A. and Premier Brands, Ltd. The district court dismissed that action, and the Court of Appeals vacated that judgment. That case is not the subject of the instant petition.

American Tobacco (South America) Ltd.; and Philip Morris Companies, Inc., Philip Morris Incorporated d/b/a Philip Morris USA, Philip Morris International, Inc., Philip Morris Products, Inc., Philip Morris Latin America Sales Corporation, and Philip Morris Duty Free, Inc.

CORPORATE DISCLOSURE STATEMENT

The Member States are sovereign states. The European Community ("EC") is a governmental body created as a result of collaboration among the majority of the nations of Western Europe, presently, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom.[2] The EC possesses the most extensive legal capacity accorded to legal persons under the laws of the Member States, and it may, in particular, be a party to legal proceedings. In such instances, the EC is represented by the European Commission.

The Departments of the Republic of Colombia and Santa Fe de Bogota, D.C., are political subdivisions of a sovereign state.

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2. As of May 1, 2004, the European Union will also include Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

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PETITION FOR A WRIT OF CERTIORARI

The European Community and ten of its Member States, as well as the Departments of the Republic of Colombia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-30a) is reported at 355 F.3d 123. The opinion of the district court dismissing the smuggling claims (App., *infra*, 31a-61a) is reported at 150 F. Supp. 2d 456. The district court amended its judgment. (App., *infra*, 63a-64a).

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. III, § 2, Cl. 1

"The judicial Power shall extend to all Cases, in Law and Equity, [and] . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT

For the first time, the European Community and ten of its Member States joined together to commence a civil action in federal court. They have taken this important step by asserting claims under U.S. domestic law, including claims for injunctive relief, predicated on diversity jurisdiction, to *enjoin* transnational cigarette smuggling carried out by U.S. companies on American soil. U.S. courts are empowered and uniquely well-situated to enjoin conduct within U.S. borders which, as alleged in detail and demonstrated below, fuels organized crime and narcotics trafficking, supports rogue states, and finances terrorist groups. The Departments of the Republic of Colombia also seek relief in the U.S. courts, and make a powerful case that U.S.-based cigarette smuggling schemes facilitate money laundering and terrorism in Colombia.

The Complaint of the EC and Ten Member States

On August 6, 2001, the EC and ten of its Member States commenced this civil action to enjoin and deter an ongoing global scheme to smuggle cigarettes.[3] The common law claims — sounding in fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation — are predicated on diversity jurisdiction. The tobacco companies directed and managed cross-border smuggling schemes with respect to their products. Cigarette smuggling schemes cause substantial harm to the EC, the Member States, and their citizens.

For example, the R.J. Reynolds Tobacco Company and related defendants (collectively, the "RJR Defendants") have been actively involved in the smuggling of their cigarettes into the EC for at least a decade as a part of a scheme to increase their market share and profitability. The Complaint set forth this scheme with specific details, including the names of companies and individuals involved in the cigarette-smuggling scheme, dates of cigarette shipments, quantities of cigarettes shipped, purported destination of the product, and the actual destinations of the product within the European Community.

The RJR Defendants actively established smuggling routes, sought out smuggling customers, and developed the smuggling scheme. They developed packaging of cigarettes specifically designed for the smuggling market. They shipped large volumes of cigarettes into known smuggling channels by way of countries such as Panama and Cyprus that allowed them to deliver cigarettes to smugglers for distribution in or through the EC and avoid the surveillance of U.S. and European law enforcement. The RJR Defendants produced large volumes of fraudulent shipping documents to misstate the destination of their cigarettes and to further the smuggling scheme.

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3. The Amended Complaint of the EC and Member States is included in the Joint Appendix in the Court of Appeals. C.A. App. 309-508. *See also* Gov't C.A. Br. at 10-18.

The RJR Defendants expedited the cigarette-smuggling conspiracy by arranging for secret payments for their products into anonymous corporations and/or bank accounts located in money-laundering havens such as Panama and Switzerland so as to allow this illegal trade to occur. The RJR Defendants were well aware that their smuggling clients were criminals located in the EC and elsewhere. They were equally aware that a large percentage of the proceeds with which these cigarettes were being purchased constituted narcotics proceeds. The RJR Defendants made the cigarette smuggling possible by, among other things, employing special mechanisms to ship and receive payment for the smuggled cigarettes.

The Complaint set forth five common law claims for which the EC and Member States sought injunctive and other equitable relief:

Public Nuisance. Defendants' activities, including smuggling of contraband and the misuse of EC ports, are public nuisances. Defendants' conduct injured, interfered with and disrupted the operation of the market for tobacco products in the EC; offended the public morals; interfered with use of public places; endangered and injured the property and safety of a considerable number of persons; injured the economic well being of the citizens of the EC; and undermined and endangered the free market which the EC is bound to protect.

Unjust Enrichment. Defendants, through their smuggling schemes, were unjustly enriched at the expense of the EC and the Member States.

Common Law Fraud. Defendants falsified documents to mislead the Petitioners as to the destination of the smuggled cigarettes, and they provided false information and concealed material information.

Negligence. Defendants owed a duty of reasonable care to refrain from causing foreseeable loss to the EC and Member States. Defendants negligently produced, marketed and distributed their cigarettes; failed to use proper procedures in the hiring, instruction, and supervision of employees who were

involved in smuggling; failed to design and implement adequate compliance programs; and failed to investigate and terminate smuggling-related conduct, despite notice of such conduct by high-level personnel.

Negligent Misrepresentation. Defendants made misrepresentations to the EC and the Member States concerning the payment and value of cigarettes, the tobacco companies' activities, the destination of cigarettes, and the nature, extent, and causes of smuggling. The conduct amounts to a fraud upon the EC and Member States and a fraud on the public.

On each of the above claims, the Complaint sought "Common Law Injunctive and Equitable Relief" including, among other things, prohibitory injunctions to restrain the tobacco companies' smuggling activities, mandatory injunctions compelling them to adopt procedures to prevent the continuation of illicit business practices, and disgorgement of ill-gotten gains. C. A. App. 417-20. The Complaint further sought an injunction (i) compelling the tobacco companies to adopt appropriate protocols to stop the smuggling, including tracking and tracing protocols to monitor the movement of product; (ii) ordering the Defendants to sell and ship cigarettes only in accordance with legitimate demand in the particular market of destination; and (iii) compelling the tobacco companies to adopt compliance programs to deter and remedy smuggling activities. *Ibid.*

Complaint of the Departments of the Republic of Colombia

The Departments of the Republic of Colombia are the functional equivalent of the states of the United States and they separately brought suit to enjoin and deter the tobacco companies' smuggling activities.[4] In that case, it was alleged that the tobacco companies, particularly the BAT Group and Brown & Williamson, smuggled their products into Colombia,

4. The Second Amended Complaint of the Departments of the Republic of Colombia (asserting claims similar to those summarized above) is included in the Joint Appendix in the Court of Appeals. C.A. App. 1931-2089. *See also* Gov't C.A. Br. at 18-24.

fueled narcotics trafficking, and engaged in money laundering – all to the detriment of the Departments.

Narcotics traffickers who sell their narcotics in the United States must also convert United States dollars into their local currency. In Colombia, the mechanism for this trade is known as the Black Market Peso Exchange or BMPE. By the early 1990s, the BMPE was almost totally funded by drug dollars. U.S. manufactured cigarettes, especially Kents, Kools and Lucky Strikes, constituted a large portion of the trade goods that were smuggled into Colombia and financed by this process.

The BAT Group, including B&W, directed and controlled every aspect of the smuggling operation into Colombia, including selection of customers, setting prices for the products, controlling the supply of products to the smugglers, and regulating the smuggled market by granting or denying favorable financing terms. In the 1990s, ninety-five percent of BAT products sold in Colombia were smuggled.

Romar, a distributor located in Aruba, was the principal conduit through which the BAT Group smuggled its products into Colombia. Romar was created at the direction of a high-ranking executive of B&W, so that BAT would have a distribution company dedicated specifically to the smuggling of its products into Colombia. BAT employees regularly visited the smuggling clients in Colombia to take stock of inventory, assess the market, and maintain close supervision over the entire smuggling operation. BAT and B&W controlled the smuggling market by controlling the supply of cigarettes, the price of the cigarettes, the profit margins for the distributors, and the financing terms for the cigarettes.

On the BAT Group's behalf, Romar arranged for the smuggling of hundreds of millions of dollars worth of BAT cigarettes per year into Colombia. Romar and BAT maintained long-term relationships with known money launderers. Even after the money-laundering activities of these individuals became notorious, Romar and BAT continued to do business with them.

Proceedings in the District Court

The EC and Member States, as well as the Departments, submitted evidence linking the smuggling alleged in the Complaints to terrorism. *See* Gov't C.A. Br. at 24-26. The EC demonstrated, for example, that since August 1999, approximately 570,000 master cases (or 5.7 billion cigarettes) of RJR-brand cigarettes were distributed to Iraq. RJR's scheme to ship cigarettes from the United States, through the ports of the EC, and into Iraq involved the Kurdistan Workers' Party, the PKK. The PKK is considered by the United States to be a foreign terrorist organization, and has been placed on the EC's list of proscribed persons and entities. The Iraqi scheme was conducted with the complicity of the former regime of Saddam Hussein and for its benefit. In a separate submission, the Departments demonstrated the relationship between cigarette smuggling and terrorism. *See* Gov't C.A. Br. at 24 n.8.

The tobacco companies moved to dismiss the Complaints on the basis of the "revenue rule." On February 19, 2002, the district court dismissed the smuggling claims with prejudice. App. 32a-61a. Applying the revenue rule, the district court dismissed smuggling claims that sought recovery of lost tax revenue. The district court also dismissed the claims for injunctive relief, even though these claims do not seek money damages or lost tax revenue. The court held that the "common law revenue rule" was not an "abstention doctrine," but rather constituted a mandatory "federal rule of common law" that divests federal and state courts of the power and "discretion" to entertain smuggling claims. App. 36a-37a & n.1.

Proceedings in the Court of Appeals

On appeal, Petitioners stressed that their claims for injunctive relief are of overarching public importance. Gov't C.A. Br. at 9, 78-79. The EC and Member States have a special need to seek such relief in the U.S. courts. This case involves schemes that constitute a real and continuing threat yet lie beyond the practical reach of an injunction of any court in the European Community. These schemes facilitate organized crime,

narcotics trafficking, and even terrorism. The companies' conduct *in the United States* is the root of a global problem. Only the U.S. courts are situated, equipped, and empowered to enjoin such conduct. *Ibid.*

On January 14, 2004, the Second Circuit affirmed, in relevant part, the judgment of the district court and barred "smuggling" claims under the "revenue rule." App. 1a-30a. The Court of Appeals felt that this decision was compelled by its prior decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002) ("*Canada*") (App. 16a), and which (according to the Second Circuit) "foreclosed" all of the "smuggling" claims in this case. App. 24a. *Canada*, however, did not squarely address claims for injunctive relief under common law, and applied the revenue rule to encompass claims for money damages (specifically, "lost tax revenue" and related "law enforcement costs"). *See Canada*, 268 F.3d at 105. Here, however, the Court of Appeals took the novel step of extending the revenue rule beyond the holding in *Canada* to bar claims for injunctive relief brought under U.S. common law.

The Second Circuit rejected the Petitioners' claims for injunctive and other equitable relief under U.S. common law with almost no discussion. App. 27a. For example, without citation to the record or authority, the Second Circuit held that the claims for injunctive relief have the "same implications as plaintiffs' claims for damages" and are "barred by the revenue rule." *Ibid.* In holding that the courts "may not" entertain smuggling claims (App. 28a), the Court of Appeals reached the remarkable result that federal courts lacked the power or "discretion" to "order the defendants to cease their smuggling operations" or otherwise remedy or deter such schemes. App. 27a-28a.

One panel member, Judge Guido Calabresi, voiced his belief that *Canada* was "wrongly decided." App. 16a n.4. Nonetheless, he concurred with the panel's ruling in this case on the basis of *stare decisis*. *Ibid.* Judge Calabresi had filed a forceful,

persuasive dissent in *Canada* and stated that the revenue rule had no application to a civil claim predicated on the "domestic law" of the United States. *See Canada*, 268 F.3d at 136 (Calabresi, J., dissenting).

REASONS FOR GRANTING THE PETITION

The petition should be held and addressed in light of *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (*en banc*), *cert. granted*, 72 USLW 3356 (U.S. Apr. 5, 2004) (No. 03-725), or alternatively, granted.

First, on April 5, 2004, this Court granted review to address the conflict among the Circuits concerning the "revenue rule" resulting from the Fourth Circuit's *en banc* decision in *Pasquantino*. The petition in this case relies upon and raises the same issues as *Pasquantino* (*infra*, at Points II(A), II(C), III(B)), points to the same conflicts as *Pasquantino* (*infra*, at Point III(B)), and raises the same fundamental question whether the "revenue rule" bars a court from exercising jurisdiction over a smuggling scheme. App. 12a-15a. Accordingly, this Court should hold this petition pending the outcome of *Pasquantino* and thereafter grant the petition for certiorari, vacate the judgment of the lower court, and remand the case for further consideration with the benefit of this Court's views on the revenue rule.

Second, if the petition is not held and addressed as requested above, review should be granted. The Second Circuit's judgment, as a practical matter, establishes a new, national rule that leaves federal and state courts powerless to enjoin or remedy smuggling schemes. This result was based on the "revenue rule." In modern times, the revenue rule has been implicated only in cases that specifically seek to recover lost tax revenue (*i.e.*, a foreign tax debt against a foreign tax debtor arising under foreign tax law). The Second Circuit, however, broke new ground by extending the revenue rule to bar equitable claims including those seeking *injunctive* relief under U.S. *domestic* law. This unwarranted expansion of the revenue rule squarely conflicts with the decisions of this Court and the Third, Fourth,

and Ninth Circuits. It is also inconsistent with the application of the revenue rule by the courts of the United Kingdom (where the revenue rule originated), Ireland and Canada. It ousts U.S. allies from federal court, in violation of U.S. policy and practice by which the U.S. routinely seeks injunctive and other equitable relief in foreign courts to remedy cross-border schemes that defraud the United States. The Second Circuit has also negated the policies embodied in several United States treaties that call for comity and access to the courts in organized crime and terrorism cases, including cases considered to be "fiscal" or tax-related in nature. The revenue rule should not have been applied to bar the claims for equitable relief under domestic law, and review should be granted to address and correct the Second Circuit's unorthodox holding.

Third, the Court of Appeals' holding, that the revenue rule divests federal courts of equitable power and discretion to enjoin and remedy smuggling, squarely conflicts with the decisions of this Court, as well as the Fourth and Eleventh Circuits. Moreover, the Second Circuit's decision is inconsistent with the application of the revenue rule by the courts of England, including the House of Lords, as well as the English Court of Chancery and its successor, the English Chancery Division.

This Court has held that *only* a clear and valid Act of Congress can deprive the federal courts of their historic, equitable power. In conflict with that long-established principle, the Second Circuit applied an eighteenth-century common law rule to divest the federal courts of their equitable powers in this case. This Court, and the Fourth and Eleventh Circuits, hold that even where the revenue rule is implicated, it is a discretionary rule of abstention that allows, but does not mandate, a court to abstain from exercising its jurisdiction. The Second Circuit, in contrast, holds that the revenue rule is mandatory, and deprives it of all equitable power to entertain a smuggling claim, including the power to order the tobacco companies to cease their smuggling activities. Finally, the Second Circuit held that it "may not" entertain a "smuggling"

claim absent the "consent" or "approval" of the Executive Branch. However, the Executive Branch's permission is not needed to allow the federal courts to fulfill their constitutional role.

This Court should either hold the petition as requested above, or alternatively, grant review to address and reconcile the conflicts arising from the Second Circuit's decision and exercise its supervisory power to vacate the Second Circuit's genuinely harmful obstacle to international comity.

I. This Petition Should Be Held Because It Involves The Central Issue That Is Pending Before This Court In *Pasquantino v. United States*, No. 03-725

On April 5, 2004, this Court granted the petition in *Pasquantino v. United States*, No. 03-725, which raised the question whether the common law revenue rule barred the courts from adjudicating a prosecution involving a scheme to defraud a foreign government of taxes. The Petitioner's main argument in *Pasquantino* was that — under the revenue rule as formulated by the Second Circuit in *Canada* — federal courts cannot adjudicate a case involving a scheme to defraud a foreign government of taxes. *Ibid.*, Petition for a Writ of Certiorari, Point I(A)(1). Petitioner in *Pasquantino* also pointed to a conflict between the Fourth Circuit (revenue rule is a discretionary rule that does not bar the case), and the First Circuit (revenue rule is a jurisdictional rule that bars the case).

The Court should hold this petition, pending the Court's decision in *Pasquantino*. This petition, like *Pasquantino*, raises the basic issue whether the revenue rule prevents the courts from adjudicating a smuggling case. When the Court reviews the ruling by the Fourth Circuit in *Pasquantino*, it will consider the proper scope of the revenue rule, and whether it is jurisdictional or discretionary — issues at the heart of the Second Circuit's disposition of *all* of the smuggling claims in the instant case. App. 12a-15a. This petition also points to the same conflicts at issue in *Pasquantino*. *See, e.g., infra*, at Point III(B). Accordingly, this petition should be held pending this Court's

disposition of *Pasquantino*, and upon that decision, this Court should grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration. Alternatively, if GVR treatment were to be found inappropriate, review should be granted and this Court should accord this case plenary consideration, for all of the reasons that follow.

II. Review Is Warranted To Resolve Several Conflicts Over Whether the Revenue Rule Bars Claims for Injunctive Or Equitable Relief Under Domestic Law

U.S. courts are open to foreign States seeking relief under American law. This Court "has long recognized the rule that a foreign nation is generally entitled to prosecute *any civil claim* in the courts of the United States upon the same basis as a domestic corporation or individual might do." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318-19 (1978) (citation and internal quotation marks omitted) (emphasis added). To deny foreign States "this privilege would manifest a want of comity and friendly feeling. To exclude foreign nations from the protections of our . . . laws . . . could not be justified in the absence of clear legislative intent." *Ibid.* U.S. courts are also open to the political departments or subdivisions of foreign States. *Land Oberoesterreich (Province of Upper Austria) v. Gude*, 109 F.2d 635, 637 (2d Cir. 1940). The Second Circuit's decision undermines this tradition of open courts.

A. The Revenue Rule Does Not Apply To Claims For *Injunctive* Relief

The Second Circuit's decision, that the revenue rule bars claims for *injunctive* relief (App. 27a), conflicts with this Court's holding in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935). The revenue rule is implicated, if at all, only in "a suit to recover taxes due to another [government] or upon a judgment for such taxes" under foreign law that would cause the courts "to scrutinize the relations of a foreign state with its own citizens." *Milwaukee County*, 296 U.S. at 272, 275 (addressing interstate dispute). The Second Circuit applies the revenue rule

as defined in *Milwaukee County* to smuggling claims asserted by foreign States, *Canada*, 268 F.3d at 126. However, the Court of Appeals extended the revenue rule to bar claims for injunctive relief in this case. The claims for injunctive relief under domestic common law are not, whether directly or indirectly, claims to recover foreign taxes. Nor are they claims to enforce foreign tax judgments, claims against foreign tax debtors, or claims to enforce foreign tax law. Rather, Petitioners' claims seek to enjoin business practices in the United States that fuel organized crime, rogue states and terrorism and thereby violate basic standards of care imposed by U.S. "domestic common law." *Canada*, 268 F.3d at 136 n.3 (Calabresi, J., dissenting). Therefore, the revenue rule does not apply.

The Second Circuit's decision to extend the revenue rule to claims for injunctive relief also conflicts with holdings of the Fourth and Ninth Circuits. The Fourth and Ninth Circuits hold that the revenue rule is implicated in cases seeking enforcement of foreign tax judgments. *See United States v. Pasquantino*, 336 F.3d 321, 329 & n.3 (4th Cir. 2003) (*en banc*) (revenue rule only "pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws"), *cert. granted*, 72 USLW 3356 (U.S. Apr. 5, 2004) (No. 03-725); *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir.1979) (foreign tax judgment); *see also* Restatement (Third) of Foreign Relations Law § 483 (1987) (revenue rule implicated in cases of foreign tax judgments). Claims for injunctive relief obviously do not seek foreign taxes (in the form of a judgment or otherwise). The revenue rule is therefore inapplicable.

The Second Circuit's decision also conflicts with the decisions of the high courts of the United Kingdom, Ireland, and Canada, which narrowly apply the revenue rule to claims that specifically seek to enforce a foreign tax debt for the benefit of a foreign treasury. *Peter Buchanan L. D. v. McVey*, [1955] A.C. 516, 529 (Ir. H. Ct. 1950) (revenue rule implicated where

"the *whole object* of the suit is to collect a tax for a foreign revenue") (emphasis added), *aff'd*, [1955] A. C. 530, 533 (Ir. S. C. 1951) (Maguire, C.J.) (revenue rule implicated because "the *sole object* [of proceedings in Scotland] was to collect a revenue debt" but noting that "if the payment of a revenue claim was only incidental and there had been other claims to be met, it would be difficult for our courts to refuse to lend assistance") (emphasis added); *United States v. Harden*, [1963] S.C.R. 366, 372-73 (Can.) ("when it appears to the court that the *whole object* of the suit is to collect tax for a foreign revenue, and that this will be the *sole result* of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction") (emphasis added); *State of Norway (Nos. 1 and 2)*, [1990] A.C. 723, 807-08 (H.L.) (revenue rule covers a "'claim for taxes'" and does not bar Norway's request for "assistance of the English courts" in obtaining evidence in a "fiscal" or tax case) (citation omitted).

The conflict between the Second Circuit and courts of foreign States impedes the coherent, international development of the law. U.S. courts look to decisions of the courts of foreign States in defining the revenue rule (App. 12a (citing *Harden*)), and foreign courts rely upon U.S. decisions to the same end. *See, e.g.*, *Peter Buchanan*, A. C. at 528 (citing Second Circuit case law). The decision below creates disharmony in an area where the courts of many nations have strived to achieve a unified, coherent approach. This conflict seriously undermines the constructive trend favoring comity and cooperation in organized crime and terrorism matters.

This Court should grant review to address and resolve the conflicts created by the Second Circuit's decision, and restore uniformity to an area that implicates fundamental interests in this country and abroad.

B. The Second Circuit's Decision Conflicts With U.S. Policy and Practice

The Court of Appeals' decision directly conflicts with U.S. policy and practice. The United States routinely seeks injunctive and other equitable relief in foreign courts to address and remedy schemes to defraud the United States.

The United States has not only pursued civil claims in foreign courts, but also has obtained injunctive relief, restitution, disgorgement, and damages, often in the face of revenue rule objections. *See, e.g., United States of America v. Ivey* [1995], 130 D.L.R. (4th) 674, 684-85 (Ont. Gen. Div.) (U.S. permitted to enforce U.S. judgment under CERCLA; the judgment was "restitutionary" and not a "revenue" matter), *aff'd*, [1996], 139 D.L.R. (4th) 570, 574 (Ont. C.A.) (Can.) (U.S. action was akin to "common law claim for nuisance" and therefore cognizable in the courts of Canada); *U.S. Securities and Exchange Commission v. Shull*, [1999] CarswellBC 1772 (B.C.S.C. [In Chambers]) (Can.) (SEC may seek enforcement of U.S. judgment; "the disgorgement order is neither a penal sanction nor a taxation measure" even though a portion of the recovery would pay taxes); *U.S. Securities and Exchange Commission v. Cosby*, [2000] CarswellBC 677 (B.C.S.C.) (Can.) (SEC argued that the trend favors enforcement of foreign judgments as a matter of comity; court allowed enforcement of U.S. judgment seeking disgorgement of ill-gotten gains); *United States v. Levy*, [1999] CarswellOnt 926 (Ont. Gen. Div.) (granting motion of the U.S. and FTC to trace and freeze assets connected to a telemarketing scheme); *U.S. Securities and Exchange Commission (Carella) v. Antar*, SEC Litigation Release No. 15251 (Feb. 10, 1997); SEC Litigation Release No. 15008 (Aug. 8, 1996) (SEC successfully pursued foreign enforcement litigation in Switzerland (Geneva and Zurich), United Kingdom, Israel, Liechtenstein, and Canada to recover the proceeds of a racketeering conspiracy); *U.S. Securities and Exchange Commission v. Dunne Finance Limited*, (Royal Court of Guernsey 1997), SEC Litigation Release No. 15300 (Mar. 18,

1997) (freezing assets in a Guernsey bank); *U.S. Securities and Exchange Commission v. Warren & Associates*, SEC Litigation Release No. 15468 (Sept. 2, 1997) (English Chancery Division granted the SEC's petition for an injunction); *The Sapphire*, 78 (11 Wall.) 164, 166-67 (1870) (U.S. brought twelve cases in foreign courts).

Indeed, direct litigation seeking injunctive and other equitable relief in foreign courts is a central component of the ongoing U.S. strategy in combating transnational fraud. The United States has attacked cross-border fraud schemes through civil proceedings in foreign jurisdictions. *See* Statement of Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, U.S. Department of Justice, Hearing Before the U.S. Senate Special Committee on Aging, Medicare Enforcement Actions: The Federal Government's Anti-Fraud Efforts, Serial No. 107-11, at 49, 62 (July 26, 2001). "In appropriate civil cases [in foreign courts], [the United States] can seek to shut down boiler rooms, enjoin con-artists from telemarketing into the United States, and freeze corporate and individual assets for eventual restitution to victims of the fraud." *Ibid.*[5]

The United States has been afforded access to foreign courts to enjoin and remedy fraudulent conduct that transcends national borders and harms U.S. interests. This country should not deny reciprocal privileges to the Petitioners in this case. Consistent with its supervisory powers, this Court should grant review to prevent the disparate treatment of U.S. allies by U.S. courts.

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5. The U.S. government's direct litigation in foreign courts is consistent with its advice to foreign States. The Executive Branch "has strongly gone on record before the Congress and in communications with foreign states" that it expects "foreign governments to protect their interests directly, through counsel of their choice" in U.S. domestic courts. *See* Memorandum for the Attorney General, Jan. 18, 1979, *reprinted in* Marian Lloyd Nash, U.S. Dep't of State, Digest of United States Practice in International Law 151, 156 (1979).

C. The Revenue Rule Does Not Apply To Claims Under U.S. *Domestic* Law

The Second Circuit held that the revenue rule bars claims under U.S. *domestic* law, finding that it is irrelevant that "the suit is brought as a civil claim under domestic law." App. 25a-26a. This holding conflicts with decisions of this Court and of the Third Circuit.

The federal and state courts may entertain civil claims under State common law that are said to involve foreign taxes. As this Court has explained:

> District Courts are given original jurisdiction of all suits of a civil nature, at common law or equity, where there is the requisite diversity of citizenship and the [requisite] amount in controversy . . . [T]he obligation to pay taxes . . . is a statutory liability, quasi contractual in nature, enforceable, if there is no exclusive statutory remedy, in the civil courts by the common-law action of debt, or indebitatus assumpsit. This was the rule established in the English courts before the Declaration of Independence.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 270-71 (1935). This Court expressly held that courts are competent to decide civil claims under State common law, including those involving foreign (*i.e.*, out-of-state) tax matters, under an approach that has been settled for more than 200 years. *Ibid.* The Second Circuit relied upon *Milwaukee County* to define the revenue rule to bar smuggling claims of foreign governments, *Canada*, 268 F.3d at 126, yet disregards *Milwaukee County's* holding that federal courts are institutionally competent to hear "tax" claims under cognizable common law theories. The Court of Appeals' holding cannot be reconciled with *Milwaukee County* and a 200-year-old legal tradition.

The Second Circuit's extension of the revenue rule to claims under domestic law also conflicts with the Third Circuit. *King of Spain v. Oliver*, 14 F. Cas. 577, 2 Wash. C.C. 429 (C.C.D. Pa. 1810) (No. 7814) (Washington, J.), *later opinion*, *King of*

Spain v. Oliver, 14 F. Cas. 572 (C.C.D. Pa. 1816) (No. 7813). Justice Washington, sitting as Circuit Justice for the Third Circuit, held that, under the Constitution and statute, the federal courts had "jurisdiction" to entertain Spain's civil claim involving lost customs duties, and rejected the argument that the municipal courts of one country cannot entertain jurisdiction of a suit brought by a foreign sovereign. *King of Spain*, 14 F. Cas. at 578-79. The Third Circuit allows a foreign State to assert a claim involving lost customs duties.[6] *A fortiori*, that Circuit would allow claims for injunctive and other equitable relief under U.S. domestic law that do not seek recovery of foreign taxes.

The Court of Appeals' decision — barring claims asserted by foreign States under U.S. common law — conflicts with the decisions of this Court and the Third Circuit. On this basis, this Court should grant review.

D. The Second Circuit Negated The Policies Embodied In Several Treaties

It is the policy of the United States, as manifested by several treaties, to provide cooperation and access to the courts to foreign States in the areas of organized crime and terrorism, including tax cases. The Second Circuit negated this policy in denying a forum to Petitioners.

The Court of Appeals correctly recognized this country's clear "policy of cooperation and reciprocal access to foreign and domestic courts in order to combat organized crime and terrorism." App. 24a n.7, citing United Nations Convention

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6. Interpreting *King of Spain*, this Court has confirmed that foreign States may assert civil claims in cases involving foreign customs duties, where the foreign State proceeds under a cognizable common law theory. *See State of Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290 (1888) (interpreting *King of Spain* as involving common law claim for a debt), *overruled on other grounds*, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 365 n.14 (1955) (interpreting *King of Spain*); *The Sapphire*, 78 (11 Wall.) 164, 167-68 (1870) (same); *see also Canada*, 268 F.3d at 136 (Calabresi, J., dissenting) (revenue rule inapplicable to claims under "a domestic law").

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, S. Treaty Doc. No. 101-4, 28 I.L.M. 493 (entered into force Nov. 11, 1990) ("1988 Vienna Convention"); United Nations Convention against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, 40 I.L.M. 335 (signed but unratified by U.S.) ("Palermo Convention"); Joint European Union-United States Ministerial Statement on Combating Terrorism, Sept. 20, 2001, 40 I.L.M. 1263.

The Second Circuit, however, asserted that these international accords "are not particularly relevant." App. 24a-25a n.7. In doing so, the lower court ignored the *texts* of the accords which call for cooperation and comity in cases that are considered to be "fiscal" or tax-related. *See, e.g.*, 1988 Vienna Convention, art. 3(10) ("fiscal offences");[7] International Convention for the Suppression of the Financing of Terrorism, S. Treaty Doc. 106-49 (entered into force June 26, 2002), 39 I.L.M. 270, art. 13 ("fiscal" claims); *see also* Palermo Convention, art. 18(22) ("fiscal matters"). These and other accords confirm that, in organized crime, money laundering and terrorism-related cases, comity and access to the courts should be extended to U.S. allies, including in cases considered to be "fiscal" or tax-related. In holding to the contrary, the Second Circuit undermined the very international accords created to address the subject matter of this lawsuit.

The Second Circuit incorrectly thought to find a basis in "our nation's tax treaties" to deny access to the courts. App. 24a-25a n.7. The Second Circuit construed tax treaties to "strictly limit" the ability of the courts to extend comity and access to the courts in "smuggling" cases. *Canada*, 268 F.3d at 119; App. 14a. Yet, the tax treaties do not mention, much less preempt, claims for *injunctive* relief under U.S. *domestic* law

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7. *See also* Official Records, United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Note 96 (emphasizing necessity of international cooperation where "offences were in violation of fiscal or customs laws").

to enjoin harmful and dangerous conduct within U.S. borders. Nor do the tax treaties deal even remotely with smuggling, organized crime, or money laundering. Those subjects are affirmatively covered in the 1988 Vienna Convention, Palermo Convention and other treaties and agreements that the Second Circuit erroneously regarded as irrelevant.

The Second Circuit thus construed the tax treaties to take away substantive rights at common law. That construction has profound, negative implications for all contracting nations. The Court of Appeals pointed to no *text* in the treaties to support its unilateral policy judgment that the tax treaties "strictly limit" international comity and access to the courts in smuggling cases. *Canada*, 268 F.3d at 119; App. 14a. In fact, nothing in the tax treaties divests signatories of substantive common law rights of action under domestic law. The tax treaties "never could have intended to take away the equal rights of all foreigners, who should contest their claims before any of our Courts, to equal justice." *The Amistad*, 40 U.S. 518, 596 (1841).

The Second Circuit's decision is equally harmful to the United States. The United States surely did not abandon its rights at law and equity against private parties when entering into tax cooperation agreements, yet the Second Circuit's approach yields that result. The decision below will invite revenue rule objections in future cases where the United States seeks cooperation from foreign authorities in cases involving both organized crime/ terrorism and tax offenses. Although the United States made a policy decision to extend comity in organized crime/terrorism cases that may be considered to be "fiscal" cases, the Second Circuit overruled that policy judgment and created a new obstacle to comity in pursuing civil remedies against organized crime and terrorism. This unfortunate precedent warrants immediate review by this Court.

III. Review Is Warranted To Resolve Several Conflicts Concerning The Equitable Power Of The Federal Courts To Enjoin And Remedy Smuggling Schemes

Even if a "smuggling" claim were found to implicate the revenue rule, the federal courts nonetheless have the power and discretion to entertain the claim. The Court of Appeals' holding to the contrary squarely conflicts with the decisions of this Court, the Fourth and Eleventh Circuits, as well as with the courts of England.

A. In Holding That Federal Courts Have No Equitable Power Or Discretion To Hear A Smuggling Claim, The Second Circuit Ignored An Unbroken Line Of Cases From This Court And The Courts Of England

The Court of Appeals' decision — that it has no power or discretion to enjoin or otherwise address a "smuggling" scheme (App. 27a-28a) — conflicts with an unbroken line of cases in the United States and in Europe holding that the discretionary power of courts of equity extends to claims, brought by foreign governments, seeking to enjoin and remedy cross-border schemes, including smuggling.

1. Only An Act Of Congress Can Deprive A Federal Court Of Its Equitable Jurisdiction

"The Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits . . . in equity.'" *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citation omitted). The Judiciary Act is considered to be "[a] contemporaneous exposition of the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821). "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction," *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), and "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see also Hecht Co. v. Bowles*, 321 U.S.

321, 330 (1944) (when "Congress desire[s] to make . . . an abrupt departure from traditional equity practice," it makes "its desire plain"). The discretionary nature of the equitable power is well settled. *See Hecht Co.*, 321 U.S. at 329; *Meredith v. Winter Haven*, 320 U.S. 228, 235-36 (1943).

Far from restricting the courts' equitable jurisdiction, Congress has declined to enact legislation to bar foreign States from the courts in smuggling cases. At the time of Congress' consideration of the Patriot Act,[8] efforts to bar allies from the courts in smuggling cases failed, and it was recognized that "smuggling, money laundering, and fraud against our allies are an important part of the schemes by which terrorism is financed." 147 Cong. Rec. S11028-29 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry).[9] It was the "intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism." 147 Cong. Rec. S11027 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry); *see also* 147 Cong. Rec. E1936 (daily ed. Oct. 29, 2001) ("If our allies are victimized by fraud, smuggling or money laundering emanating from U.S. soil, they should have the benefit of U.S. laws and U.S. courts to combat those offenses") (statement of Rep. Wexler).

The Second Circuit's disavowal of any power to enjoin or remedy smuggling schemes is in direct conflict with this Court's holdings that *only* an Act of Congress can restrict the federal courts' equitable power. *Califano*, 442 U.S. at 705. Whatever the merits of the revenue rule, an eighteenth-century English judge-made rule does not equate to a Congressional command.

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8. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("Patriot Act").

9. The illicit cigarette trade has funded terrorist groups, such as al-Qaeda. *See* GAO, Report No. GAO-04-163, Terrorist Financing at 11-12 (Nov. 2003); UN Security Council, Report of Monitoring Group, S/2003/669 at 11 (para. 32) (July 8, 2003).

It therefore cannot be used to divest the federal courts of their equitable power to entertain this case. Nor may the federal courts unilaterally divest themselves of such power. This Court should address and resolve the conflict between the decision below and this Court's own decisions, and exercise its supervisory power to restore to the federal courts their historic equitable power to enjoin and remedy smuggling schemes.

2. The Equitable Jurisdiction Of Federal Courts Extends To Cross-Border Schemes, Including Smuggling

The equitable jurisdiction of the federal courts "'is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 318 (citation omitted). "[W]here relief can be given by the English chancery, similar relief may be given by the courts of the Union." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564 (1851) (government may seek injunction to enjoin cross-border public nuisance that injures the State in its revenues, tolls, and public works). Accordingly, the decisions of the English Court of Chancery (and its successor, the English Chancery Division) are directly relevant to whether the U.S. courts have equitable power to enjoin and remedy smuggling schemes.

In 1828, the House of Lords held that "it would be a monstrous injustice" if a foreign State could not seek equitable relief in the English courts. *See Hullet v. King of Spain*, I Dow & Clark 488, 491 (H.L.) (1828) (foreign sovereign is entitled to sue in the courts of England in equity; rejecting argument that an English court of equity should not be made instrumental in enforcing the prerogative of a foreign sovereign).

The English Court of Chancery (succeeded by the Chancery Division) historically has been open to foreign governments, including the United States, seeking injunctive and other

equitable relief in connection with cross-border smuggling and fraud schemes. *See Kingdom of Spain v. Christie Ltd.*, [1986] 1 W.L.R. 1120 (Eng. Ch. D.) (Spain stated an equitable cause of action arising from the smuggling of a Goya oil painting out of Spain based upon forged export documents); *Emperor of Austria v. Day* (1861), 3 de G. F. & J. 217, 253 (1861) (Emperor of Austria may seek injunctive relief in the courts of England to restrain cross-border counterfeiting scheme; plaintiff is "entitled" to act to prevent "wrongful" and "civilly unlawful" conduct that harms "the public revenues, the fiscal resources [or] the pecuniary means of the realm") (*per* Knight Bruce, L.J.); *United States of America v. Prioleau*, 2 H. & M. 559 (1865) (U.S. permitted to seek injunction and receiver to restrain and recover government property derived from taxes assessed by the Confederate States of America); *United States of America v. Wagner*, [1866-67] L.R. 2 Ch. App. 582, 584, 1866 WL 8317 (CA in Chancery) (U.S. sought an accounting and recovery of money and property; counsel observed that a suit instituted by the President of the United States was pending in France); *King of Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301, 321 (1851) (King of Two Sicilies may seek equitable relief before the courts of England to recover proceeds of "Royal revenues"); *see also Republic of Haiti v. Duvalier*, [1990] QB 202, 217 (Eng. C. A.) (affirming injunction sought by Republic of Haiti, holding "[t]his case demands international co-operation between all nations").

This Court therefore should grant review to restore the equitable power to the federal courts in smuggling cases.

B. The Revenue Rule Is A Discretionary Rule Of Comity, Not A Mandatory Rule That Divests the Federal Courts of Equitable Power and Discretion

Even if applicable, the revenue rule is discretionary, and does not extinguish a federal court's equitable power.

This Court, as well as the Fourth and the Eleventh Circuits, hold that the revenue rule is, at most, a discretionary abstention doctrine, pursuant to which a court may, "on the principle of comity," hear a case involving foreign tax matters.

See, e.g., *Milwaukee County*, 296 U.S. at 272 (revenue rule "is not rightly addressed to any want of judicial power in the courts" and is not a matter of "jurisdiction"); *Massachusetts v. Missouri*, 308 U.S. 1, 20 (1939) (same); *United States v. Pasquantino*, 336 F.3d 321, 329 (4th Cir. 2003) (*en banc*) (revenue rule is "permissive"); *id.* at 340 (Gregory, J., dissenting) ("revenue rule is a discretionary doctrine"); *Ecuador v. Philip Morris*, 188 F. Supp. 2d 1359, 1369 (S.D. Fla. 2002) ("the revenue rule is a rule of abstention"), *aff'd sub nom.*, *Republic of Honduras v. Philip Morris*, 341 F.3d 1253, 1256 (11th Cir. 2003) ("abstain"), *cert. denied*, 124 S. Ct. 1075 (2004); *see also* Restatement (Third) of Foreign Relations Law § 483 (1987) (revenue rule is discretionary, not mandatory); *State of Norway (Nos. 1 and 2)*, [1990] A.C. 723, 808 (H.L.) (revenue rule does not "go to the jurisdiction of the English court;" court "declines" jurisdiction as a matter of judicial discretion). In contrast, the Court of Appeals held that the revenue rule is a mandatory doctrine that divests the courts of the power and discretion to enjoin or remedy a smuggling scheme. App. 27a. This conflict, concerning the very basic question of whether the revenue rule is discretionary or mandatory, warrants review by this Court.

This fundamental division among the Courts of Appeals extends to criminal law as well. The First Circuit holds that the revenue rule divests the courts of the power to entertain criminal prosecutions involving cross-border smuggling schemes to defraud foreign governments of foreign tax revenue. *See United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996). In contrast, the Second and Fourth Circuits hold that the courts have the power to entertain such prosecutions. *See United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997), *cert. denied*, 525 U.S. 812 (1998); *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (*en banc*) (following *Trapilo*). This Court denied review in *Boots* and *Trapilo*, as well as in

Canada.[10] This Court should hold the petition in light of *Pasquantino* (*see* Point I, *supra*), but if this Court does not hold the petition, review should be granted to resolve the conflicts that have emerged and, pursuant to this Court's supervisory power, provide guidance to the federal courts in this important area.

C. The Second Circuit's Approach Conflicts With *First National City Bank*

The Second Circuit held that, while the Judiciary "may not" on its own address the "smuggling" claim (App. 27a-28a), the Executive Branch — by "affirmatively" expressing its "consent or approval" to the suit — could vest the courts with the power to address the claim. App. 14a-15a, 26a; *Canada*, 268 F.3d at 123 & n.25 (citing *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972)). This approach conflicts with *First National City Bank*.

In *First National City Bank*, six Justices of this Court concluded that federal courts are not required to obtain the permission of the Executive Branch to exercise their constitutionally prescribed powers. *First National City Bank*, 406 U.S. at 773 (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its

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10. While review was denied in *Canada*, in that case this Court was not presented with the question now presented for review. *See* Brief of the United States as *Amicus Curiae* at n.1 (No. 01-1317) (declining to state a view concerning whether the revenue rule bars claims for "equitable" relief under domestic law). Nonetheless, the Second Circuit's approach in *Canada* is irreconcilable with its earlier holding in *Trapilo*. *See Canada*, 268 F.3d at 137-38 (Calabresi, J., dissenting). The *Canada* decision has been justifiably criticized. *See, e.g.*, Recent Case, *Separation of Powers – Foreign Affairs – Second Circuit Holds That The Revenue Rule Bars A Foreign Sovereign's Civil RICO Suit For Tax Revenue*, 115 Harv. L. Rev. 2333, 2339-40 (2002) (criticizing *Canada* for a "faulty separation-of-power analysis").

jurisdiction. Such a notion, in the name of separation of powers, seems to me to conflict with that very doctrine"); *id.* at 789 (Brennan, J., dissenting, joined by Justices Stewart, Marshall, and Blackmun) ("The Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim"); *id.* at 772-73 (Douglas, J., concurring in result) (adopting Justice Brennan's view on this point, noting "[o]therwise the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others"); *see also* Louis Henkin, Foreign Affairs and the U.S. Constitution at 140 (2d ed. 1996) ("In the *First National City Bank* case, we know, most of the Justices expressed their independence of, and distaste for, *ad hoc* dictation or direction by the State Department").

Contrary to the Second Circuit's view, a federal court does not require the Executive Branch's "consent" or "approval" to fulfill its constitutional role. Without question, federal courts have the equitable power and discretion to entertain a smuggling claim under U.S. domestic law. Nonetheless, the Second Circuit held federal courts "may not" hear a smuggling case brought by a foreign State without the "consent" or "approval" of the Executive Branch. In reaching this conclusion, the Court of Appeals redistributed to the Executive Branch the power to determine the courts' jurisdiction on an *ad hoc* basis; abdicated its power and discretion at law and equity; and increased the power of the Executive Branch at the expense of the Judiciary — even though the Executive Branch did not lay claim to such power in this case. This approach conflicts with *First National City Bank* and warrants review.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States v. Pasquantino*, No. 03-725, and upon the disposition of that case, the Court should grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration. If, however, GVR treatment is found to be inappropriate, review should be granted and this case should be decided on the basis of plenary consideration.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JANUARY 14, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: January 20, 2003 Decided: January 14, 2004)

Docket Nos. 02-7325 (L), 02-7330 (CON), 02-7323

THE EUROPEAN COMMUNITY, Acting on its own behalf and on behalf of the Member States it has power to represent, and the KINGDOM OF BELGIUM, REPUBLIC OF FINLAND, FRENCH REPUBLIC, HELLENIC REPUBLIC, FEDERAL REPUBLIC OF GERMANY, ITALIAN REPUBLIC, GRAND DUCHY OF LUXEMBOURG, KINGDOM OF THE NETHERLANDS, PORTUGUESE REPUBLIC, and KINGDOM OF SPAIN, Individually,

Plaintiffs-Appellants,

— v. —

RJR NABISCO, INC., R.J. REYNOLDS TOBACCO CO., R.J. REYNOLDS TOBACCO COMPANY, R.J. REYNOLDS TOBACCO INTERNATIONAL, INC., RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP. and R.J. REYNOLDS TOBACCO HOLDINGS, INC., PHILIP MORRIS INTERNATIONAL, INC., PHILIP MORRIS COMPANIES, INC., PHILIP MORRIS INCORPORATED, d/b/a PHILIP MORRIS PRODUCTS, INC., and PHILIP MORRIS DUTY FREE, INC.,

Defendants-Appellees.

Appendix A

DEPARTMENT OF AMAZONAS, DEPARTMENT OF ANTIOQUIA, DEPARTMENT OF ATLANTICO, DEPARTMENT OF BOLIVAR, DEPARTMENT OF CAQUETA, DEPARTMENT OF CASANARE, DEPARTMENT OF CESAR, DEPARTMENT OF CHOCO, DEPARTMENT OF CORDOBA, DEPARTMENT OF CUNDINAMARCA, DEPARTMENT OF HUILA, DEPARTMENT OF LA GUAJIRA, DEPARTMENT OF MAGDALENA, DEPARTMENT OF META, DEPARTMENT OF NARINO, DEPARTMENT OF NORTE DE SANTANDER, DEPARTMENT OF PUTUMAYO, DEPARTMENT OF QUINDIO, DEPARTMENT OF RISARALDA, DEPARTMENT OF SANTADER, DEPARTMENT OF SUCRE, DEPARTMENT OF TOLIMA, DEPARTMENT OF VALLE DEL CAUCA, DEPARTMENT OF VAUPES and SANTA FE DE BOGOTA, CAPITAL DISTRICT,

Plaintiffs-Appellants,

— v. —

PHILIP MORRIS COMPANIES, INC., PHILIP MORRIS INCORPORATED, d/b/a PHILIP MORRIS PRODUCTS, INC., PHILIP MORRIS LATIN AMERICA SALES CORPORATION, PHILIP MORRIS DUTY FREE, INC., BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD., B.A.T. INDUSTRIES, P.L.C., BROWN & WILLIAMSON TOBACCO CORPORATION, USA; BATUS TOBACCO SERVICES, INC. and BRITISH AMERICAN TOBACCO (SOUTH AMERICA) LTD.,

Defendants-Appellees.

Appendix A

THE EUROPEAN COMMUNITY, Acting on its own behalf and on behalf of the Member States it has power to represent, and the KINGDOM OF BELGIUM, REPUBLIC OF FINLAND, FRENCH REPUBLIC, HELLENIC REPUBLIC, FEDERAL REPUBLIC OF GERMANY, ITALIAN REPUBLIC, GRAND DUCHY OF LUXEMBOURG, KINGDOM OF THE NETHERLANDS, PORTUGUESE REPUBLIC, and KINGDOM OF SPAIN, Individually,

Plaintiffs-Appellants,

— v. —

JAPAN TOBACCO, INC., JT INTERNATIONAL MANUFACTURING AMERICA, INC., JTI DUTY-FREE USA, INC., JT INTERNATIONAL S.A., JAPAN TOBACCO INTERNATIONAL U.S.A., INC. and PREMIER BRANDS, LTD.,

Defendants-Appellees.

SOTOMAYOR, *Circuit Judge.*

Plaintiffs-appellants are the European Community ("EC") and various of its member states (collectively, the "EC plaintiffs"), as well as certain Departments of the nation of Colombia (the "Departments of Colombia," and collectively with the EC plaintiffs, "plaintiffs").[1] They appeal

1. The EC plaintiffs, in addition to the EC itself, are the following nations: the Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, (Cont'd)

from the judgment of the United States District Court for the Eastern District of New York (Garaufis, J.), dismissing their complaints in three related suits against the defendants, tobacco product manufacturers Philip Morris, RJR Nabisco, Brown & Williamson Tobacco Corp., British American Tobacco, Japan Tobacco, Inc., and each one's affiliated entities. Plaintiffs allege that the defendants have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, by masterminding several ongoing schemes to smuggle contraband cigarettes into the plaintiffs' territories. In the process, the defendants allegedly have entered into conspiracies to commit mail and wire fraud, money laundering, misrepresentations to customs authorities, and various common law torts. Plaintiffs claim that the defendants' conduct has caused them economic harm in the form of lost tax revenues and law enforcement costs. The district court dismissed the complaints in their entirety, finding that because plaintiffs' claims were premised on purported violations of their tax laws, they would require the court to interpret and enforce foreign revenue laws, in violation of the revenue rule and this Court's holding in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Canada*"),

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(Cont'd)

Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain. The Colombian plaintiffs are the following Departments: Amazonas, Antioquia, Atlantico, Bolivar, Caqueta, Casanare, Cesar, Choco, Cordoba, Cundinamarca, Huila, La Guajira, Magdalena, Meta, Narino, Norte De Santander, Putumayo, Quindio, Risaralda, Santader, Sucre, Tolima, Valle Del Cauca, Vaupes, and Santa Fe De Bogota, Capital District.

cert. denied, 537 U.S. 1000, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002).

On appeal, plaintiffs primarily contend that *Cànada* does not bar their suit because, subsequent to that decision, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub.L. No. 107-56, 115 Stat. 272 (the "Patriot Act"), which amended RICO to include terrorism-related offenses as predicate acts, and has legislative history that plaintiffs maintain reflects congressional intent to allow foreign sovereigns to use RICO to impose liability on domestic tobacco companies that attempt to evade their revenue laws. We hold that the Patriot Act and its legislative history do not constitute the clear evidence of congressional intent necessary to find that Congress has abrogated the revenue rule.

Plaintiffs also challenge the district court's dismissal of their RICO claims predicated on money laundering activities without leave to replead. We hold that the district court did not abuse its discretion in denying leave to replead because doing so rendered the judgment final and thus appealable. Moreover, plaintiffs have not demonstrated any prejudice arising from having to replead their claims in a new action.

Finally, the EC and its member states challenge the district court's dismissal of their action against Japan Tobacco, Inc., and its affiliated entities, as barred by the revenue rule, on the ground that the plaintiffs had not yet had a chance to serve the defendants with the complaint when the district court rendered its decision. We hold that the

dismissal was premature because absent proper service upon the defendants, the court did not yet have jurisdiction over the action. We therefore vacate and remand for further proceedings.

BACKGROUND

This appeal arises from three actions filed by the plaintiffs that were treated as related and decided together by the district court. Because the plaintiffs make substantially similar allegations, seek the same damages, and rely on the same legal theories in the three complaints, the cases are identical in all relevant respects, and we will not differentiate among the actions, except where necessary.

The EC plaintiffs allege that the tobacco companies directed and facilitated contraband cigarette smuggling by studying smuggling routes, soliciting smugglers, and supplying them with cigarettes encased in packages that allowed the defendants to monitor and control the smuggling. The smugglers would then forge shipping documents and route the cigarettes so as to avoid paying the customs duties and excise taxes of the countries into which the cigarettes were smuggled. The profits from the smuggling were partially funneled into bonuses and kickbacks for defendants' executives. Facilitating the smuggling trade also enabled the tobacco companies to argue to the public and the EC that the high import taxes maintained by the EC's member states were fostering a black market in cigarettes. Moreover, the defendants allegedly knew or should have known that the funds used by the smugglers to purchase the cigarettes were generated through the sale of illegal narcotics in the United

States and then laundered through a black market money exchange before being paid to the defendants.

The Departments of Colombia make similar allegations, claiming that the defendants have established and maintained small volumes of legal cigarette sales in Colombia in order to conceal and facilitate the many illegal shipping routes into the country. Some of the defendants collectively engaged in a number of meetings to coordinate their use of smuggling and to fix the prices of smuggled cigarettes. They have also labeled their products so as to exercise control over the smuggling, have secreted the proceeds in Swiss banks, and have lobbied for lower import taxes on the ground that high taxes promote smuggling. Finally, the defendants allegedly were aware that Colombian smugglers were funding their smuggling activities with the laundered proceeds of narcotics sales made in the United States.

The plaintiffs assert that the defendants and others participated in a smuggling enterprise within the meaning of RICO, *see* 18 U.S.C. § 1961(4), and that they committed a number of predicate acts of racketeering, including wire and mail fraud, money laundering arising from both the defendants' acceptance of the proceeds from narcotics trafficking as payment for cigarettes and their attempts to conceal their smuggling profits, and violations of the Travel Act, 18 U.S.C. §§ 1952, 1961(1)(B). They also assert a number of state common law claims against the defendants, including negligent misrepresentation, public nuisance, unjust enrichment, and common law fraud.

Appendix A

All of the complaints allege the same damages and seek the same monetary and injunctive relief. The plaintiffs seek treble damages pursuant to RICO, claiming that as a result of the smuggling, "the proper duties and taxes have not been paid on the aforesaid cigarettes," including customs duties, value-added taxes, and excise taxes amounting to hundreds of millions of dollars per year. They also claim that they have been "required to expend substantial funds to fight against cigarette smuggling." In addition, the plaintiffs seek a plethora of injunctive relief that would require the defendants to cease their smuggling activities, to disgorge their profits from smuggling, and to create protocols and compliance programs that would allow the plaintiff nations' law enforcement authorities to ensure that defendants are complying with plaintiffs' customs and revenue laws.

Plaintiffs began filing these lawsuits in 2000, and since then the cases have had a somewhat complicated procedural history. Initially, the Departments of Colombia filed suit against Philip Morris, Brown & Williamson Tobacco Corporation, British American Tobacco South America Ltd., and their affiliated companies, *see Department of Amazonas v. Philip Morris Companies,* No. 00 Civ. 2881(NGG). Shortly thereafter, the EC, on behalf of itself, sued RJR Nabisco, Philip Morris, Japan Tobacco, British American Tobacco, Brown & Williamson, and their affiliates, *see European Community v. RJR Nabisco, Inc.*, No. 00 Civ. 6617(NGG), and the action was consolidated with the *Amazonas* action. The district court subsequently deconsolidated the cases and dismissed the EC's lawsuit because the EC itself did not have standing under RICO, although it reserved decision on the defendants' motion to dismiss in the *Amazonas* case.

Appendix A

See European Community v. RJR Nabisco, Inc., 150 F.Supp.2d 456, 459, 500-02 (E.D.N.Y.2001) ("*European Community I*").

The EC again filed suit against RJR Nabisco and Philip Morris in August 2001, this time with several of its member states as co-plaintiffs, and the case was marked related to the still-pending *Amazonas* case. *See European Community v. RJR Nabisco, Inc.*, No. 01 Civ. 5188(NGG). In October 2001, this Court decided *Canada*, holding that claims by foreign sovereigns that were premised on violations of foreign tax laws are barred by the revenue rule. *Canada*, 268 F.3d at 126. Based on our holding in *Canada*, the defendants in the EC plaintiffs' lawsuit moved to dismiss the complaint in December 2001, and that motion was joined with the pending motion to dismiss in the *Amazonas* case. Before the district court ruled on these motions, the EC plaintiffs filed a separate lawsuit against Japan Tobacco and its affiliated companies in January 2002, containing the same allegations as its suit against RJR Nabisco. *See European Community v. Japan Tobacco, Inc.*, No. 02 Civ. 164(NGG). This suit was also marked related to the two pending lawsuits. In February 2002, before the EC plaintiffs had served the Japan Tobacco defendants with the summons and complaint, the district court ruled on the outstanding motions to dismiss, dismissing all three complaints as barred by the revenue rule. *European Community v. Japan Tobacco, Inc.*, 186 F.Supp.2d 231 (E.D.N.Y.2002) ("*European Community II*").

Appendix A

The district court held that plaintiffs' RICO claims were premised on lost tax revenues, and *Canada* therefore required that all of the claims be dismissed. *Id.* at 236-37, 241-45. Although plaintiffs' complaints do not distinguish between "smuggling" and "money laundering" claims, but simply allege both types of conduct as predicate acts of racketeering under RICO, the district court treated them separately in its decision. The court dismissed the smuggling claims on the basis of the revenue rule, reasoning that, like the plaintiff foreign sovereign in *Canada,* plaintiffs here sought relief based solely on lost tax revenues and expenditures made in furtherance of their revenue laws. Adjudicating the claims would therefore require the court to interpret and enforce foreign revenue laws, in contravention of *Canada* 's holding that, in most circumstances, courts may not pass upon foreign tax laws. *Id.* at 236-37. Responding to plaintiffs' argument that our holding in *Canada* was displaced by the passage of the Patriot Act, the court concluded that the text and legislative history of the Act's RICO amendments did not provide clear evidence of congressional intent to abrogate the revenue rule. *Id.* at 238-42. The court also dismissed the money laundering claims without prejudice, finding that these claims were premised on the alleged smuggling scheme because they involved the laundering of the funds for, and proceeds from, the smuggling activities. *Id.* at 243- 45. When considered independently of the smuggling allegations barred by the revenue rule, therefore, the money laundering claims did not allege any causal connection between the alleged money laundering and the lost tax revenues. *Id.* at 242-45. The district court entered judgment dismissing the complaints

in all three actions on March 21, 2002. The court dismissed the smuggling claims with prejudice, and the money laundering claims without prejudice.[2] This appeal followed.

DISCUSSION

On appeal, plaintiffs raise a number of challenges to the district court's dismissal of the three complaints. With respect to the court's decision on the merits, plaintiffs concede that our decision in *Canada* establishes that suits to enforce foreign tax laws implicate the revenue rule, but argue primarily that the legislative history of the Patriot Act, passed in October 2001, evinces congressional intent to allow foreign sovereigns to use RICO to sue tobacco companies for lost tax revenues. Thus, plaintiffs contend that the Patriot Act requires us to find that Congress has abrogated the revenue rule for the purposes of RICO suits. Plaintiffs also attempt to distinguish their claims from those at issue in *Canada* by arguing that the revenue rule is not triggered here because the executive branch has indicated its consent to this suit, and that the district court misconstrued the revenue rule as an absolute bar to suit rather than a discretionary rule, and consequently failed to exercise its discretion.

Plaintiffs also appeal the district court's dismissal of the money laundering claims without leave to replead, but do not challenge the court's substantive characterization of the claims as they were alleged in the complaints. Finally, the EC plaintiffs challenge the district court's dismissal of their

2. Although the district court at first granted leave to replead the money laundering claims, it later amended its judgment to deny leave to replead.

suit against Japan Tobacco before it had been served with the complaint or appeared in the action.

We review the district court's dismissal of the complaints *de novo. Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 194 (2d Cir.2003). All inferences must be drawn in favor of the plaintiffs, and we may affirm only if we find that, taking the allegations in the complaints as true, the plaintiffs have alleged no facts upon which they can be granted relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). We review the district court's denial of leave to replead for abuse of discretion. *Oneida Indian Nation v. City of Sherrill,* 337 F.3d 139, 168 (2d Cir.2003).

I. The Revenue Rule Holding

A. *Canada*'s Explication of the Revenue Rule

We explained in *Canada* that the common law revenue rule holds that the "courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Canada,* 268 F.3d at 109. The revenue rule is implicated whenever "the substance of the claim is, either directly or indirectly, one for tax revenues," *id.* at 130, such that "the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in favour of the plaintiff," *id.* at 131 (quoting *United States v. Harden,* [1963] S.C.R. 366, 371). A suit directly seeks to enforce foreign tax laws when a judgment in favor of the plaintiffs would require the defendants to reimburse them for lost tax revenues. In contrast, indirect enforcement occurs when a foreign state seeks a remedy that would give

extraterritorial effect to its tax laws; for instance, a suit seeking damages based on law enforcement costs is an attempt to shift the cost of enforcing the tax laws onto the defendants, and would therefore require the court indirectly to enforce the tax laws. *Id.* at 131-32.

Canada holds that the revenue rule reflects both sovereignty and separation of powers concerns. *Id.* at 126. The courts of one sovereign will not enforce the laws of another sovereign if they are contrary to the public policy of the forum state. Tax laws strongly implicate this principle, as they often embody the political and social judgments of the sovereign and its people. Accordingly, claims by foreign sovereigns invoking their tax statutes may embroil the courts in an evaluation of the foreign nation's social policies, an inquiry that can be embarrassing to that nation and damaging to the forum state. *Id.* at 112. Moreover, because the conduct of foreign relations is primarily the realm of the legislative and executive branches, judicial examination and enforcement of foreign tax laws at the behest of foreign nations may conflict with the other branches' policy choices with respect to cooperation in tax enforcement, and create the risk that the judiciary will be "drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." *Id.* at 114-16, 123.

Although the revenue rule arose out of the pragmatic desire of eighteenth-century English judges to promote "British trade that would otherwise have been unlawful," *European Community II,* 186 F.Supp.2d at 234 (internal quotation marks omitted), we held that it remains in force

because it continues to protect modern separation of powers and sovereignty concerns, *Canada,* 268 F.3d at 109-15. In *Canada,* we undertook an extensive examination of the tax treaties in effect between the United States and other nations, and concluded that their grant of only limited reciprocal tax enforcement assistance reflected the political branches' continuing recognition of the revenue rule. *Id.* at 115-19. Thus, the modern revenue rule is rooted in both our perception that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches by abrogating the rule without evidence that doing so would be consonant with the policies of the other branches.

The revenue rule is therefore not absolute. Even if the substance of the claim invokes foreign tax laws, the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present. Thus, for example, where the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States. *Id.* at 113, 123 n.25. In *Canada,* we suggested that executive consent may be found where the United States itself institutes a prosecution designed to punish those who have defrauded foreign governments of tax revenues, or where the treaties between the United States and the sovereigns at issue provide for broad, reciprocal tax enforcement assistance. *Id.* at 113,

121-24 & nn.24-25. The executive also might indicate its consent to the suit by other means, such as submitting a statement from the State Department or filing an amicus brief.

Absent such indication that the executive branch consents to the suit, a claim that triggers the revenue rule is barred unless the plaintiffs establish that superior law, such as the federal statute that provides the applicable right of action, abrogates the rule in the context in which the plaintiffs seek to enforce their tax laws. *See id.* at 113, 119, 126. Because the revenue rule is a longstanding common law rule, and its abrogation in any one situation necessarily impacts foreign relations, a statute or treaty "must speak directly to the matter" in order to abrogate it. *Id.* at 129 (internal quotation marks omitted). In *Canada,* we held that RICO, as enacted in 1970, does not contain the clear evidence of congressional intent necessary to rebut the presumption that statutes are enacted against the background of the common law and abrogate the revenue rule. *Id.* We found nothing in RICO's text that explicitly authorizes foreign nations to use RICO's civil remedy provisions to enforce their tax laws extraterritorially, and its legislative history did not contain any manifestation of congressional intent to grant such authorization. *Id.*

B. Application of the Revenue Rule to Plaintiffs' Allegations

The allegations in plaintiffs' complaint are markedly similar to those at issue in *Canada.* Plaintiffs are foreign sovereigns attempting to use RICO to impose liability on various domestic and foreign tobacco companies for

smuggling and money laundering, premising their assertions of injury to business and property on the taxes that they would have levied on the cigarettes, had they been legitimately imported, and on the costs of enforcing their tax laws. *Cf. id.* at 132-33. Because plaintiffs' claims arise exclusively from tax-related losses and costs, adjudicating these claims would implicate the concerns discussed in *Canada,* requiring the court to evaluate the policies behind the relevant foreign tax laws, interpret their provisions, and enforce them by awarding damages. *Canada* is therefore controlling, and we must hold that plaintiffs' claims trigger the revenue rule[3] and are barred unless plaintiffs establish that Congress has abrogated the revenue rule as it applies to the circumstances of this case.[4]

Plaintiffs argue that, even though *Canada* held that RICO does not abrogate the revenue rule, the recent amendments to RICO passed as part of the Patriot Act in October 2001 demonstrate Congress's intent to abrogate the rule. The crux of plaintiffs' argument, both on appeal and below, is that the addition of several money laundering crimes to RICO's predicate acts evinces Congress's understanding that the purpose of RICO is to prevent precisely the conduct alleged

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3. Although plaintiffs also argue that the revenue rule is not implicated by their claims, we will first discuss their primary argument, that the Patriot Act has abrogated the rule.

4. Judge Calabresi, a member of this panel, dissented in *Canada,* 268 F.3d at 135. Although he continues to believe that *Canada* was wrongly decided, he, like the other members of this panel, recognizes that we are bound by circuit precedent, and that *Canada* controls the disposition of this case.

here, and the legislative history of the amendments, particularly Congress's deletion from the draft statute of an amendment that would have codified the *Canada* holding, provides clear evidence of Congress's intent to abrogate the rule.

Plaintiffs first focus on the text of the Patriot Act's amendments to RICO, contending that the addition of several international money laundering predicate offenses, such as money laundering crimes against foreign nations and financial conduct that aids terrorist groups, reflects congressional intent to abrogate the revenue rule. *See* 18 U.S.C. § 1956(c)(7). We disagree. The Patriot Act did not change the structure or focus of RICO; it simply added additional offenses to those that constitute predicate acts of racketeering. While we stated in *Canada* that the presumption against statutory derogation of the common law does not apply when "a statutory purpose to the contrary is evident," *Canada,* 268 F.3d at 127 (internal citation omitted), the recent additions to RICO have not so altered RICO's statutory scheme or apparent purpose as to warrant our revisiting *Canada*'s conclusion that RICO does not abrogate the revenue rule. Plaintiffs may be correct that the RICO amendments contained in the Patriot Act are designed to combat precisely the conduct alleged here; but the conduct alleged in *Canada* was also within the scope of RICO's prohibitions, *see id.* at 106-08. Because *Canada* holds that the operation of the rule does not depend on the type of conduct alleged, but rather on the substance of the relief sought, the foreign policy concerns raised by the suit, and the identity of the plaintiffs, a mere showing that the plaintiffs' suit will further the policies embodied in the statute

at issue is not sufficient to abrogate the rule. Rather, the statute must provide clear evidence, textual or otherwise, that Congress believes that the revenue rule should not apply. *Id.* at 128.

Plaintiffs further argue that Congress provided the necessary evidence of congressional intent to abrogate the revenue rule by deleting a provision in the initial version of the Act that would have stated that the addition of the money laundering offenses did not expand the jurisdiction of the courts to hear claims based on foreign excise taxes. The section of the Act that added new international money laundering offenses to RICO's list of predicate acts, *see* 18 U.S.C. §§ 1956, 1961(1), initially provided that the amendments were subject to the following rule of construction:

> (b) **RULE OF CONSTRUCTION**.—None of the changes or amendments made by the Financial Anti-Terrorism Act of 2001 shall expand the jurisdiction of any Federal or State court over any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by [a] United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.

Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. § 106(b).[5] This provision was deleted from subsequent versions of the Act, however; as the October 23, 2001 section-by-section analysis of the Act notes, the House of Representatives "dropped [the] provision carving out tobacco companies from RICO liability for foreign excise taxes." 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001). In addition, several individual legislators indicated their opposition to the rule of construction after it was dropped from the bill. For instance, Senator John Kerry, the author of the money laundering provisions, stated that the provision conflicted with "the intent of the legislature that our allies will have access to our courts and the use of our laws if they are victims of smuggling, fraud, money laundering, or terrorism." 147 Cong. Rec. S11028 (daily ed. Oct. 25, 2001). Plaintiffs argue that the omission of this provision from the enacted text of the Act, as well as the statements by individual legislators indicating opposition to the provision, provide the clear evidence of congressional intent necessary to abrogate the revenue rule.

As an initial matter, plaintiffs have provided no evidence that the deletion of the rule of construction has any effect on the meaning of the Act's amendments to RICO. In deleting the rule of construction that would have codified *Canada*'s holding, Congress left the enacted text of RICO just as silent on the issue of abrogation as it was when *Canada* was decided. Moreover, the absence of the rule of construction does not add any meaning to the text of the new predicate

5. The Financial Anti-Terrorism Act of 2001 was later subsumed into the Patriot Act. *See* 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001).

offenses, or suggest that those amendments are in any way meant to abrogate the revenue rule. We cannot find clear evidence of congressional intent to overrule *Canada* and abrogate the revenue rule as it applies to RICO suits from legislative history that is not related to any actual amendment to RICO. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (noting that courts do not give "authoritative weight" to elements of the legislative history that are "in no way anchored in the text of the statute").

Nonetheless, plaintiffs assert a number of arguments in an attempt to establish that the legislative history alone compels us to find congressional intent to abrogate the revenue rule. They first contend that the deletion itself is sufficient evidence of legislative intent to abrogate the rule, relying on the Supreme Court's statement, in the context of interpreting a term within a RICO provision, that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (interpreting the word "interest" in the context of RICO's enterprise provisions). While this rule of construction is helpful in giving meaning to a particular term or phrase contained within a statutory provision, it may not be used to effectively amend a statute where Congress has not actually altered its enacted text. The mere deletion of the provision is a far more ambiguous act than plaintiffs suggest, because Congress's reluctance to codify *Canada*'s holding does not necessarily reflect its desire to overrule that holding. "[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," as "congressional inaction

lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft,* 535 U.S. 274, 287 (2002) (internal quotation marks and citations omitted). This is particularly the case here, where the proposed amendment simply would have codified the revenue rule as it was explicated in *Canada,* and would not have effected any change in the law. Thus, the deletion alone, untethered to the actual enactment, cannot provide a basis upon which to infer any congressional intent to abrogate the revenue rule, much less the clear evidence required by our holding in *Canada.*

Plaintiffs contend, however, that the statements of several legislators to the effect that foreign nations should be able to use RICO to impose liability on domestic companies for foreign excise taxes indicate that the provision was deleted because Congress intended to abrogate the rule. Several legislators clearly disagreed with the revenue rule, and made remarks to this effect. *See* 147 Cong. Rec. E1936 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler) ("I am pleased that a provision earlier included . . . which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act. . . ."); *id.* at H7205 (daily ed. Oct. 23, 2001) (statement of Rep. Conyers) ("I am very proud [that] we dropped the administration proposal . . . that would have . . . prevented RICO liability for tobacco companies. . . ."); *id.* at S11028 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("The House-passed rule of construction could have potentially limited the access of foreign jurisdictions to our courts. . . .");

id. at S11007 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy) (stating that Congress had eliminated the "carve-out of tobacco companies from RICO liability for foreign excise taxes"). None of these statements represent the "collective understanding" of the committees responsible for the Act,[6] however, and they are therefore not entitled to very much weight. *See United States v. Nelson,* 277 F.3d 164, 186-87 (2d Cir.2002), *cert. denied,* 537 U.S. 835 (2002) ("We . . . 'eschew [] reliance on the passing comments of one Member, and casual statements from the floor debates.'") (quoting *Garcia v. United States,* 469 U.S. 70, 76 (1984)). Because the legislative record does not suggest anything other than that a few individual legislators wished to abrogate the revenue rule, those legislators' statements do not render the deletion of the proposed rule of construction unambiguous, or provide adequate insight into that deletion. Taken as a whole, the legislative history does not provide clear evidence that Congress intended to abrogate the revenue rule when it enacted the Patriot Act.

Plaintiffs next argue, in the alternative, that the legislative history of the Patriot Act constitutes persuasive post-enactment evidence that Congress intended RICO, as enacted in 1970, to abrogate the revenue rule. This is, in essence, an invitation to revisit *Canada*'s holding that RICO, as it then existed, did not abrogate the revenue rule, in light of the

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6. Although plaintiffs refer to the section-by-section analysis of the Act inserted into the legislative record by Senator Leahy as the "Senate's [R]eport," *see* 147 Cong. Rec. S11007 (daily ed. Oct. 25, 2001), there is no Senate Report on the Patriot Act. The analysis is simply Senator Leahy's own discussion of the provisions of the Act. *See id.* at S10990 (Oct. 25, 2001).

statements made in relation to the proposed rule of construction. The Patriot Act's legislative history, however, does not provide clear evidence of any congressional understanding that RICO has always abrogated the revenue rule. First, the individual legislators' comments indicate, at most, a reluctance to enact the common law revenue rule into the statutory text. They do not explicitly or implicitly express the view that RICO itself abrogates the revenue rule, and we are unwilling to infer this belief from a few passing statements commenting on a provision that had already been removed from the text of the Patriot Act. Second, as noted above, the isolated statements of individual legislators do not express the intent of Congress as a whole, and are therefore weak evidence of post-enactment intent. Third, expressions of legislative intent made years after the statute's initial enactment are entitled to limited weight under any circumstances, even when the post-enactment views of Congress as a whole are evident. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) ("[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have very little, if any, significance.") (internal quotation marks omitted). Thus, these statements do not convince us that *Canada* wrongly concluded that the 91st Congress did not intend to abrogate the revenue rule when it enacted RICO.

We do not hold that a statute's legislative history may never contain sufficient indicia of congressional intent to find that the statute abrogates the revenue rule. *Cf. Canada*, 268 F.3d at 129 (noting that a statute's legislative history and purpose, as well as its text, may be relevant to the inquiry into whether it abrogates the revenue rule). Here, however,

the purported evidence of intent to abrogate on which plaintiffs rely is particularly weak. We cannot find that a few remarks in the legislative history of the recent amendments to RICO, and the deletion of a provision that would have codified *Canada,* have altered the statute itself, or provided a reliable indicator of congressional intent in the absence of an actual enactment. Were we to treat Congress's decision not to enact the proposed rule of construction as an explicit abrogation of the revenue rule, we would be privileging the legislative history of the Patriot Act over its enacted language. To do so would turn on its head the rule that any analysis of a statute and Congress's intent in enacting it must primarily be founded in the text of the statute itself. *See Shannon,* 512 U.S. at 583 ("To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process.").

C. Plaintiffs' Remaining Attempts to Distinguish *Canada*

Plaintiffs also attempt to distinguish their claims from those at issue in *Canada* by arguing that the foreign policy concerns necessary to trigger the revenue rule are not present here. All of these arguments are foreclosed by *Canada,* however, and do not change our conclusion that the revenue rule is implicated by plaintiffs' claims.

First, plaintiffs argue that the several treaties of friendship between the United States and EC member states indicate that the political branches intend to provide foreign nations with unlimited access to domestic courts.[7]

7. The Palermo Convention of 2000, Vienna Convention of 1988, and Joint European Union-United States Ministerial Statement (Cont'd)

This contention is simply an attempt to reargue *Canada*, which examined the tax treaties currently in force between the United States and various nations, *Canada*, 268 F.3d at 115-22, and concluded that the revenue rule remains "fully consistent with our broader legal, diplomatic, and institutional framework," *id.* at 119. Plaintiffs have not proffered any evidence of a shift in United States policy with respect to tax treaties and enforcement assistance since our decision in *Canada*, and thus we cannot conclude that the political branches now intend to provide judicial tax enforcement assistance to other nations.[8]

(Cont'd)
on Combating Terrorism (2001) all express a policy of cooperation and reciprocal access to foreign and domestic courts in order to combat organized crime and terrorism. *See The United Nations Convention Against Transnational Organized Crime, opened for signature* Dec. 12, 2000, 40 I.L.M. 335 (unratified by the United States); *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, S. Treaty Doc. No. 101-4 (entered into force Nov. 11, 1990); *Joint EU-US Ministerial Statement on Combating Terrorism*, Sept. 20, 2001, 40 I.L.M. 1263. In *Canada*, however, we implicitly acknowledged that foreign sovereigns have long had access to United States courts, and may sue for violations of domestic laws, *see Canada*, 268 F.3d at 123, but because the revenue rule has reflected the reluctance of the United States and many other nations to enforce foreign tax laws for two hundred years, *id.* at 110, we looked to our nation's tax treaties, rather than treaties that simply provide general access to courts, to determine whether the political branches' actions indicated an abandonment of the rule. Thus, the treaties that plaintiffs cite are not particularly relevant to whether the revenue rule should apply here.

8. Indeed, plaintiffs attempt to argue that the numerous tax treaties between the United States and several of the plaintiff nations
(Cont'd)

Second, plaintiffs contend that, even though the landscape of treaties has not changed since our decision in *Canada,* the executive branch has indicated its consent to this suit, obviating the separation of powers and sovereignty concerns that trigger the rule. The United States has not intervened in opposition to this suit, despite its purported knowledge of the action, and plaintiffs argue that this "neutrality" evidences the United States's judgment that this lawsuit is not antithetical to United States foreign policy interests. We, however, require more than executive inaction in order to find consent to the suit. Rather, the executive branch must affirmatively "express its consent" or approval, for instance, by bringing suit itself. *Id.* at 123 & n.25. Because the political branches have chosen to negotiate treaties providing for only limited reciprocal tax enforcement assistance to other nations, *see id.* at 115-22, absent affirmative consent to a suit by the executive branch, we must assume that a lawsuit seeking general extraterritorial enforcement of foreign tax laws exceeds the bounds of the assistance that the executive branch has decided to give. Moreover, were executive inaction sufficient to render the revenue rule inoperative in a given case, the United States would be required to intervene in every case that might

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(Cont'd)
that provide for only limited tax assistance are irrelevant, because plaintiffs' claims are based not on the treaties but on RICO, rendering their claims civil suits pursuant to United States law rather than foreign tax enforcement claims. This argument is foreclosed by *Canada,* in which we noted that if the substance of a suit seeks extraterritorial tax enforcement, the fact that the suit is brought as a civil claim under domestic law does not affect the application of the revenue rule. *Id.* at 131.

implicate the revenue rule. Such a proposition is clearly untenable.

Third, plaintiffs attempt to distinguish their claims by focusing on their requests for injunctive relief, arguing that "[i]njunctive relief to enjoin or abate conduct on U.S. soil does not involve foreign tax law in any way." Adjudicating plaintiffs' entitlement to injunctive relief, however, would require the court to evaluate and interpret foreign tax laws. Moreover, the requested injunctions would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages, as plaintiffs would have the court order the defendants to cease their smuggling operations, disgorge their profits, and put into place measures that would allow foreign customs officials to ensure that they are complying with those nations' revenue laws. Thus, the requested relief, though different in form, has the same implications as plaintiffs' claims for damages, and is barred by the revenue rule. *See id.* at 131.

Finally, plaintiffs argue that even if their claims implicate the revenue rule, it is a discretionary doctrine that, when triggered, allows the district court to consider the foreign relations implications and domestic law enforcement interests at stake before deciding whether to "abstain" from hearing the claims.[9] This argument is also foreclosed by *Canada,*

9. As part of this argument, plaintiffs contend that the district court should have considered the factual nature of each claim separately, and that "[t]he district court wrongly expanded the revenue rule to 'preempt' state common law without considering the substance of each claim and without finding specific conflicts with federal (Cont'd)

which clearly establishes that, once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated. *Id.* at 113. Thus, the district court did not misconstrue the nature of the rule.

II. The District Court's Denial of Leave to Replead the Money Laundering Claims

Plaintiffs also argue that the district court abused its discretion in dismissing their money laundering claims without leave to replead. The district had initially dismissed the claims "without prejudice to replead," but later amended its judgment to dismiss the claims "without prejudice." We review the denial of leave to replead for abuse of discretion, *Oneida Indian Nation v. City of Sherrill,* 337 F.3d 139, 168 (2003), and find none here.[10]

Although the court did not explain its reasoning for amending the judgment and denying leave to replead, the denial had the effect of rendering the judgment final as to

(Cont'd)
policy." Because appellants' state law claims are completely duplicative of their RICO claims, in terms of the conduct alleged and the monetary and injunctive relief sought, the district court was correct to find that these claims also implicate the revenue rule.

10. Because plaintiffs do not challenge the district court's analysis of their money laundering claims, and they are free to replead these claims in a separate action, we do not review the court's determinations as to the nature of the claims and plaintiffs' allegations of causation. *See European Community II,* 186 F.Supp.2d at 242-43.

all claims and allowing an appeal of the entire case. *See Elfenbein v. Gulf & Western Indus., Inc.*, 590 F.2d 445, 449 (2d Cir.1978). Because rendering a final judgment in order to make the decision appealable is a logical reason for denying leave to replead, and plaintiffs have not demonstrated that they are in any way prejudiced by the necessity of repleading their money laundering claims in a new lawsuit, we find that the district court did not abuse its discretion in dismissing the money laundering claims without leave to replead.

III. The District Court's Dismissal of the Japan Tobacco Action

The district court dismissed the EC plaintiffs' action against Japan Tobacco and its affiliated companies along with the two other related lawsuits, even though Japan Tobacco had not yet been served in the action and had not appeared or joined in the motion to dismiss. Because no adverse party had been joined, the district court had not yet assumed jurisdiction over the case. The dismissal for failure to state a claim was therefore premature. *Lewis v. State of New York*, 547 F.2d 4, 6 (2d Cir.1976) (holding that a district court may not dismiss for failure to state a claim before an adverse party has appeared in the suit).

Moreover, the Federal Rules of Civil Procedure allow plaintiffs 120 days after the filing of an action to serve the defendants with the summons and complaint. Fed.R.Civ.P. 4(m). Because plaintiffs had approximately 90 days left in which to serve the defendants when the court dismissed the claim, there was no procedural basis for the dismissal under the Federal Rules.

Appendix A

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED as to the judgments in *European Community v. RJR Nabisco, Inc.*, 2004 WL 60976, No. 02-7330, and *Department of Amazonas v. Philip Morris Companies,* No. 02-7325. Because we affirm the judgment below based on the revenue rule, we need not address the other arguments raised by the defendants on appeal.

The district court's judgment as to *European Community v. Japan Tobacco, Inc.*, No. 02-7323, is VACATED and REMANDED for proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED FEBRUARY 20, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

00-CV-00164 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

JAPAN TOBACCO, INC., et al.,

Defendants.

01-CV-05188 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

RJR NABISCO, INC., et al.,

Defendants.

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00-CV-02881 (NGG)

DEPARTMENT OF AMAZONAS, et al.,

Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., et al.,

Defendants.

MEMORANDUM AND ORDER

GARAUFIS, *District Judge.*

Now before this court are motions by RJR Nabisco, Inc., Philip Morris, Inc., Japan Tobacco, Inc., and other tobacco industry entities (the "Defendants") to dismiss the complaints in the above-captioned cases. The complaints have been brought by the European Community, various individual member nations of the European Community, and Departments of the nation of Colombia (the "EC," the "Member States," and the "Departments," respectively, or, together, "Plaintiffs"). Because, for the purposes of these motions, there are no relevant differences among the three above-titled cases, this opinion addresses all three. For the reasons discussed below, Defendants' motions are GRANTED in their entirety.

Appendix B

Factual & Procedural History

This action stems from a series of cases that have been before this court, discussed in *The European Community v. RJR Nabisco, Inc.*, 150 F.Supp.2d 456, 459-61 (E.D.N.Y.2001) ("*EC I*"). The above-titled cases brought against RJR Nabisco, et al., and against Japan Tobacco, Inc., et al., were brought by the Member States and the EC after *EC I*, where this court found that the EC, the sole plaintiff in *EC I*, lacked standing to bring civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, *et seq.* ("RICO"). The claims currently before the court are substantially similar to those of *EC I*, and this court presumes familiarity with the complex factual and procedural background reviewed in that opinion. The following brief factual recitation is taken largely from *EC I*.

Plaintiffs allege, in general terms, that Defendants have been actively involved in smuggling contraband cigarettes into the EC, the Member States, and the Departments, as well as various other locations around the world, for many years; that Defendants' smuggling activities span the globe, and include conduct and effects in the Eastern District of New York; that Defendants entered into an agreement with distributors, customers, agents, consultants and other co-conspirators to participate in a common scheme to smuggle contraband cigarettes into the EC, the Member States, and the Departments; that Defendants conspired with others to promote and conceal their smuggling activities by means including, *inter alia*, fixing the price of contraband cigarettes; and that in the process of smuggling cigarettes,

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Defendants engaged the business and services of narcotics traffickers and money launderers, and in so doing facilitated or engaged in the laundering of tainted money. Plaintiffs further allege that, as a result of the foregoing, Plaintiffs have suffered economic harm in the form of lost tax revenues and other costs attributable to rampant illegal activities. Finally, Plaintiffs allege that Defendants agreed with co-conspirators to commit tortious acts, and did in fact commit tortious acts, in conducting the smuggling scheme. Plaintiffs pray for monetary, declarative, and injunctive relief to remedy the foregoing actions.

Discussion

I. Standard of Review

In reviewing a motion brought pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences from those allegations in the light most favorable to the plaintiff. *See Albright v. Oliver,* 510 U.S. 266, 268 (1994); *Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir.1999); *Jaghory v. New York State Dep't of Educ.,* 131 F.3d 326, 329 (2d Cir.1997). The complaint may be dismissed only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hoover v. Ronwin,* 466 U.S. 558, 587 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). In deciding such a motion, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996) (internal quotation marks and citations omitted).

Appendix B

II. The Revenue Rule

A. Introduction

The common law revenue rule was crafted in eighteenth-century England, in a time of intense commercial rivalry between nations. Note, 77 Harv. L.Rev. 1327, 1328 (1964). The English courts crafted the rule in large part because "refusing acknowledgment of a foreign revenue law ... promote[d] British trade that would otherwise have been unlawful." Barbara A. Silver, *Modernizing the Revenue Rule; The Enforcement of Foreign Tax Judgments,* 22 Ga. J. Int'l & Comp. L. 609, 613 (1992). That rationale eventually became more of an embarrassment than a boon to British and American economic and judicial sensibilities. *See The Anne,* 1 F. Cas. 955, 1 Mason 508, 956 No. 412 (C.C.D.Mass.1818) (Story, J.) (attacking the refusal of courts to enforce foreign municipal regulations as contrary to principles of national comity, sound morals, and public justice); Kovatch, *Recognizing Foreign Tax Judgments,* 22 Hous. J. Int'l L. 265, 287-288 (2000). The revenue rule, however, was never expressly overturned, and lived on, albeit in somewhat tempered form. *See Banco Frances e Brasileiro v. Doe,* 36 N.Y.2d 592, 597 ("[T]he rule [is not] analytically justifiable. Indeed, much doubt has been expressed that the reasons advanced for the rule, if ever valid, remain so. But inroads have been made.")

Case law in this circuit has recognized the great change in conditions under which the revenue rule exists. *United States v. Trapilo,* 130 F.3d 547, 550 n.4 (2d Cir.1997)

("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete.") (quoting *Restatement (Third) of the Foreign Relations Law of the United States* § 483, Reporters Note 2 at 613 (1987)). To this date, however, the revenue rule has not been overruled, and while times have changed greatly, the revenue rule has not. This court is controlled by a still-vital version of the rule, predicated on considerations of institutional integrity, recently articulated in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Attorney General of Canada*"). The following discussion is controlled by that decision's treatment of the revenue rule.

B. The Revenue Rule After *Attorney General of Canada*

1. The Rule

The revenue rule provides "that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Attorney General of Canada*, 268 F.3d at 109. Furthermore, although the Second Circuit, before *Attorney General of Canada*, "ha[d] not ruled on the precise scope of the rule," it is now clear that this Circuit is controlled by "that version of the revenue rule under which United States courts abstain from assisting foreign sovereign plaintiffs with extraterritorial tax enforcement." *Attorney General of Canada* 268 F.3d at 109, 115, 119, 128. Despite the foregoing language, however, this version of the rule is neither a manifestation of standard abstention doctrine, nor an invitation to exercise discretion, as Plaintiffs would have

this court understand it. (Pls.' Mem. of Law in Opp'n to Defs.' Mot. Under 12(B)(6) to Dismiss the Am. Compl. For Failure to State a Claim Upon Which Relief Can be Granted at 35-39.) Instead, when triggered, this "time-honored common law prudential rule" will foreclose relief absent an "indication that Congress intended . . . to abrogate the revenue rule."[1] *Attorney General of Canada* 268 F.3d at 106, 129.

2. Triggering the Rule

In determining whether the revenue rule is triggered, a court that is "presented with . . . a request which potentially implicates the revenue rule" must "examine whether the substance of the claim is, either directly or indirectly, one for tax revenues." *Attorney General of Canada* 268 F.3d at 130. The examination is guided by the Second Circuit's instruction that "[w]hat matters is not the form of the action, but the substance of the claim." *Id.* Where a claim seeks to enforce foreign tax laws, it is of no import that the party bringing the claim does so in compliance with validly enacted United States law, as the revenue rule does not entertain "a formalistic distinction between an action based explicitly

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1. Although it is not express in *Attorney General of Canada*, this court understands the revenue rule to be a federal rule of common law. The close association with federal and constitutional policy concerns, such as foreign relations and separation of powers, as well as the *Attorney General of Canada* Court's repeated invocation of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), indicate to this court that the rule is one of federal common law. *See Attorney General of Canada* 268 F.3d at 109, 112, 114-15, 119, 123, 125-26, 132, 134. The revenue rule thus preempts any conflicting state law.

and entirely on [foreign] law and one which, in effect, pleads violations of [foreign] law through the medium of a United States statute." *Attorney General of Canada* 268 F.3d at 131, n.39.

Analysis of whether a claim is a direct claim for foreign tax revenues turns on "the object of the claim." *Id.* If, "at bottom, [a foreign sovereign plaintiff] would have a United States court require defendants to reimburse [the foreign sovereign plaintiff] for [the foreign sovereign's] unpaid taxes," then the claim is a direct one. *Id.* Indirect claims will also run afoul of the revenue rule, and include any claim whereby the damages alleged by plaintiff are derivative of unpaid foreign taxes, or based on the costs of enforcing foreign tax laws. *Id.* at 132. Thus, any action in which the court "will have to pass on[] the validity of [foreign] revenue laws and their applicability [to the claims at bar]" constitutes "enforcing [foreign] revenue laws," and thereby triggers the revenue rule. *Attorney General of Canada* 268 F.3d at 108 (quoting *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, 143 (N.D.N.Y. 2000)).

3. Exceptions to the Rule

Once the revenue rule is triggered, an action is barred from going forward, with one exception: where the plaintiff can show adequate manifestation of executive or legislative will sufficient to allay the foreign relations and separation of powers concerns underlying the revenue rule, suit may proceed. The exception stems from the fact that the revenue rule derives its continued vitality from foreign relations and

separation of powers concerns. *See Attorney General of Canada* 268 F.3d at 115, 119, 125, 126, 128, 132. Thus, the concerns underlying the current version of the revenue rule are satisfied where the proper coordinate branch adequately confers its blessings on jurisdiction. Therefore, in that instance, a court may go forward with suit and pass on foreign revenue laws, despite the revenue rule. As an example, the *Attorney General of Canada* Court indicates that when the United States brings a suit, action will not be barred by the revenue rule. This is because, when the United States brings the action, "the United States Attorney acts in the interest of the United States, and his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation." *Attorney General of Canada* 268 F.3d at 123.[2]

4. Overriding the Rule

Finally, the revenue rule, as a rule of common law, may be abrogated by superior law. A treaty affirmatively conferring jurisdiction over foreign revenue laws in contravention of the revenue rule will supplant the common

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2. Additionally, the *Attorney General of Canada* Court indicates that litigation may potentially proceed, despite concerns for foreign relations matters, where the executive confers consent. *Attorney General of Canada* 268 F.3d at 123, n. 25 (citing *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759-768-770 (1972)). Here, as in *Attorney General of Canada,* "[t]here has been no such expression of consent or approval. . . ." *Id.*

law rule by virtue of being supreme law of the land.[3] U.S. CONST. art. VI. Validly enacted legislation may also abrogate a common law rule. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313-14 (1981). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Attorney General of Canada* 268 F.3d at 127 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)). To do so, a statute must demonstrate "clear evidence of congressional intent to abrogate [the common law rule]." *Attorney General of Canada* 268 F.3d at 127.

III. Application of the Revenue Rule to the Case at Bar

A. The RICO claims

Plaintiffs bring various RICO claims predicated on two grounds: smuggling and money laundering. In this section

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3. This court notes that the *Attorney General of Canada* Court examined treaties at some length for the ability of a given treaty scheme to demonstrate general congruence (or the lack thereof) between domestic adjudication of foreign revenue laws and the policy rationales underlying the revenue rule, rather than for a treaty's clear demonstration of superior law. The *Attorney General of Canada* Court's discussion of treaties, however, occurred under the section of the opinion establishing the continued vitality of the revenue rule, and was designed to reinforce the validity of the policy considerations that ultimately led the court to find for the continued applicability of the revenue rule. This court understands the ultimate ruling in *Attorney General of Canada* to hold that a treaty will only override the revenue rule by virtue of being superior law, and will only adequately effect abrogation with a clear statement of abrogating law. Such a showing has not been made in the case before this court.

of the opinion, the court will consider the RICO claims pursuant to smuggling grounds. The court will consider the claims in light of the money laundering grounds at Part IV of this opinion.

1. The RICO Smuggling Claims Trigger the Revenue Rule

Facing a similar set of RICO claims for cigarette smuggling, the trial court in *Attorney General of Canada* held,

> [T]o state a civil RICO claim, Canada must prove more than the mere intent to defraud another of property or the mere establishment of a scheme to defraud utilizing the mails or wire communications in furtherance of that scheme. Again, to have standing to recover, Canada must allege injury in fact, which ultimately obligates it to prove that some act or acts in furtherance of the scheme caused it to sustain injury. *See* 18 U.S.C. § 1964(c); [*Sedima, S.P.L.R. v. Imex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285 (1985)]. This distinction is critical to the outcome of this action. . . . Thus, to the extent Canada seeks to prove injury to business and property as a result of lost tax revenues and recover therefor, its claims are barred by the Revenue Rule and, therefore, must be dismissed.

Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc., 103 F.Supp.2d 134, 142-144 (N.D.N.Y.2000).

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The Second Circuit supplemented the holding of the District Court with the following:

> To proceed with the law enforcement costs claim, we would have to examine the tax laws at issue in order to assess the causation aspect of this claim. For example, we would have to assess whether the law enforcement costs were in fact spent on achieving the cessation of cigarette smuggling. So doing, we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants. These inquiries could draw the courts into troubled waters.

Attorney General of Canada, 268 F.3d at 133.

The present actions involve RICO claims for injury in the form of lost customs duties, lost value added taxes, and lost excise taxes, and also for injury in the form of additional contributions by Member States to the European Community to compensate for tax revenue that the European Community otherwise would have collected. Predicated on smuggling, the claims all clearly implicate the revenue rule in that they would necessarily cause this court to pass on foreign tax laws.

Plaintiffs also bring various RICO claims predicated on harms derivative of smuggling. The injuries include, *inter alia*, loss of funds spent to combat cigarette smuggling, and coordinate damage to the security and integrity of Plaintiffs' relevant institutions and markets. Additionally,

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Plaintiffs seek equitable and injunctive relief designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling. All of these claims also trigger the revenue rule under the *Attorney General of Canada* ruling. Here, as there, "we would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants." *Attorney General of Canada,* 268 F.3d at 133.

Having triggered the revenue rule, and in order to proceed with their RICO claims predicated on smuggling, Plaintiffs must demonstrate that Congress, in enacting RICO, or in a subsequent amendment to RICO, intended to abrogate the revenue rule. The *Attorney General of Canada* decision, however, states:

> The language and structure of RICO and its legislative history offer no hint that Congress intended the statute to afford a civil remedy to foreign nations for the evasion of foreign taxes. Moreover, there is no language in RICO or in its legislative history that demonstrates any intent by Congress to abrogate the revenue rule. For the statute to change such a time-honored common law prudential rule, it must "speak directly" to the matter; yet it does not. Absent such indication, we must presume Congress understood the common law against which it legislated and intended that this common law doctrine should co-exist with the RICO statute.

Attorney General of Canada, 268 F.3d at 129. Plaintiffs must overcome the foregoing to state a case under RICO.

2. The USA PATRIOT ACT Does Not Abrogate the Revenue Rule Under RICO

a. The USA PATRIOT ACT of 2001

The *Attorney General of Canada* Court has ruled that RICO, on its face, does not abrogate the revenue rule, and has likewise made clear that, to pursue their RICO claims, Plaintiffs must provide evidence that RICO, as it was enacted by the 91st Congress or affirmatively amended thereafter, statutorily abrogates the common law revenue rule. To demonstrate RICO's abrogation of the revenue rule, Plaintiffs direct the court's attention to legislation, passed subsequent to the *Attorney General of Canada* ruling, titled the "Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001", Pub.L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) (hereinafter, the "Patriot Act"). The Patriot Act was passed in the wake of, and as its name indicates, in response to the events of September 11, 2001.

Section 315 of the Patriot Act amends and expands 18 U.S.C. § 1956(c)(7), a RICO provision that establishes money-laundering as a predicate act. Pub.L. No. 107-56, § 315; or 18 U.S.C. § 1961(1). The Patriot Act's expansion of 18 U.S.C. § 1956(c)(7) on its face does not amend RICO with respect to the revenue rule, and Plaintiffs adduce no other amendment to RICO pertaining to the revenue rule.

Thus Plaintiffs rely on the following legislative history, in connection with § 315, to indicate clear abrogation of the revenue rule.

b. The Patriot Act's Legislative History

The legislative history in question turns in part on a Rule of Construction that was part of a version of the Patriot Act, H.R. 3004, that passed the House of Representatives on October 17, 2001. The Rule of Construction, however, was subsequently dropped on reconsideration by the House. H.R. 3162. The Rule of Construction would have provided,

> None of the changes or amendments made by the Financial Anti Terrorism Act of 2001 [the former title of the Patriot Act] shall expand the jurisdiction of any Federal or State court over any civil action or claim for monetary damages for the nonpayment of taxes or duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.

147 Cong. Rec. H6924-01 (daily ed. Oct. 17, 2001). The Section by Section analysis of H.R. 3162 noted the deletion with the following: "Dropped provision carving out tobacco companies from RICO liability for foreign excise taxes." 147 Cong. Rec. H7159-03 (daily ed. Oct. 23, 2001).

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H.R. 3162 passed the House on Oct. 24, 2001. 147 Cong. Rec. H7224-01 (daily ed. Oct. 24, 2001).

Regarding § 315 of the Patriot Act and the deleted Rule of Construction, Representative Wexler, a member of the House Judiciary Committee, stated:

> I am pleased that a provision earlier included in money laundering legislation, which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act of 2001, the final version of comprehensive anti-terrorism legislation. The sections of the final version of this bill which expand the definition of Specified Unlawful Activities for Money Laundering are a crucial component of the USA PATRIOT Act. We all know that in order to crush terrorism in all its forms, it will be necessary for us to put an end to the money laundering which is essential to the financing of terrorists' networks. In order for our legislation to be effective, our laws against money laundering must have the widest possible scope. Just as criminals continually are finding new and creative ways to subvert and circumvent our laws, our laws must be broad enough and flexible enough to allow our courts to fight against money laundering in any form we find it. In response to United States requests, many of our allies, including the European Community and its Member States have strengthened their money laundering laws in a cooperative effort to battle

> money laundering and terrorism. It is our intent to recognize and assist the efforts of our allies in our joint effort to fight fraud and money laundering wherever and in whatever form we find it. If our allies are victimized by fraud, smuggling or money laundering emanating from U.S. soil, they should have the benefit of U.S. laws and U.S. courts to combat those offenses. The expanded definition of Specified Unlawful Activities will ensure that money laundering associated with crimes or fraud committed against our allies shall constitute violations of U.S. law thereby giving the United States and our allies the maximum capability to utilize U.S. law to combat the money laundering. Just as the United States has always recognized the fundamental right of friendly nations to have access to our courts to enforce their rights, we shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded benefit of our criminal and civil laws.

147 Cong. Rec. E1936-02 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler).

Plaintiffs also point to the following comments of Senator John F. Kerry, one of the forces behind § 315:

> It has been brought to my attention that this bill, as originally passed by the House, contained a rule of construction which could have limited

our ability to provide assistance and cooperation to our foreign allies in their battle against money laundering. The House-passed rule of construction could have potentially limited the access of foreign jurisdictions to our courts and could have required them to negotiate a treaty in order to be able to take advantage of our money-laundering laws in their fight against crime and terrorism. The conference report did not include a rule of construction because the Congress has always recognized the fundamental right of friendly nations to have access to our courts to enforce their rights. Foreign jurisdictions have never needed a treaty to have access to our courts. Since some of the money-laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent of this bill for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering. That is why we did not include a rule of construction in the conference report. That is why we today clarify that it is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism. I make these remarks today because there should be no confusion on this issue and comments made by others should not be construed as a reassertion of this rule of construction which we have soundly rejected. Our allies have had and must continue

to have the benefit of U.S. laws in this fight against money laundering and terrorism.

Smuggling, money laundering, and fraud against our allies are an important part of the schemes by which terrorism is financed. It is essential that our money laundering statutes have appropriate scope so our law enforcement can fight money laundering wherever it is found and in any form it is found. By expanding the definition of "Specified Unlawful Activity" to include a wide range of offenses against friendly nations who are our allies in the war against terrorism, we are confirming that our money laundering statutes prohibit anyone from using the United States as a platform to commit money laundering offenses against foreign jurisdictions in whatever form that they occur. It should be clear that our intention that the money laundering statutes of the United States are intended to insure that all criminals and terrorists cannot circumvent our laws. We shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded use of our criminal and civil laws.

147 Cong. Rec. S10990-02 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry).

c. The Patriot Act Does Not Alter RICO's Treatment of the Revenue Rule

This court acknowledges that the Patriot Act's legislative history offers persuasive evidence that the 107th Congress would not allow the revenue rule to bar civil suit under RICO for injury such as that alleged in the instant case. But Plaintiffs must make more than a showing of what Congress wants or even believes RICO to be. Plaintiffs must adduce legislative history demonstrating that Congress affirmatively acted to statutorily abrogate the revenue rule with RICO. *Attorney General of Canada,* 268 F.3d at 127-28. The legislative history of the Patriot Act fails to make that showing.

i. The Legislative History Does Not Effect Abrogation of the Revenue Rule

The removed rule of construction represents the only actual instance of relevant Congressional action. On the strength of the section-by-section analysis and the statements of Senator Kerry and Representative Wexler, Plaintiffs argue that, in removing the clause that would have enshrined the non-abrogation of the revenue rule, Congress effectively amended RICO, causing RICO instead to abrogate the revenue rule. But the removal of the Rule of Construction is simply too slender a reed upon which to effect an abrogation of the revenue rule and a consequent reversal of *Attorney General of Canada.*

Appendix B

The Supreme Court has looked askance on inferring action from inaction, and has stated,

> "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92nd Congress in passing [the legislation at issue] is also considerably attenuated.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159, 169-70 (2001) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990))). In the case at hand, the Second Circuit in *Attorney General of Canada* recently stated as a matter of law that RICO does not abrogate the revenue rule. Congress subsequently removed from the Patriot Act a provision which would have statutorily enshrined the *Attorney General of Canada* holding. Regardless of what Congress's negative action may reveal with respect to Congress's feelings about the *Attorney General of Canada* decision, Congress's removal of the provision does not present this court with the sort of authority required by *Attorney General of Canada* to abrogate the revenue rule. Moreover, the legislative history does not present this court with any superior authority

adequate to find that the Second Circuit has been reversed as a matter of law.[4]

ii. The Legislative History Does Not Demonstrate Prior Abrogation of the Revenue Rule

Alternatively, Plaintiffs may be heard to argue that the legislative history demonstrates that Congress intended to abrogate the revenue rule when it passed RICO in 1970. Again, however, Plaintiffs do not present this court with sufficient evidence to find clear abrogation. While the words of Senator Kerry and Representative Wexler are a powerful condemnation of the effects of the revenue rule, this court

4. This court notes that in certain circumstances, negative legislative action will demonstrate sufficient force to effect positive law. *See, e.g., New York Telephone Co. v. New York State Dep't of Labor,* 440 U.S. 519 (1979) (repeated failure to expressly preempt state power to make policy regarding payments to strikers in the National Labor Relations Act indicated lack of preemption); *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1940) (failure to overrule case law extending Sherman Act protections to labor unions indicated legislative endorsement of the case law). As was the case in both *New York Telephone* and *Apex Hosiery,* negative legislative action, when sufficient to effect positive law, commonly does so only where the lack of action may be construed as an affirmative legislative decision not to disturb prior law or practice. William Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L.Rev. 67 (1988). Here, among other factors distinguishing the case at bar, the negative legislative action involved a refusal to enshrine a rule identified in the case law. Instead of passively supporting prior law, then, this legislative inaction would actively overrule preexisting law, *i.e., Attorney General of Canada.* To the extent that legislative inaction can make law in this manner, this court demands a considerably greater showing than that called for in standard inaction cases.

must consider those comments through the lens of established rules of statutory construction. Two rules of construction limit the weight this court may give to the commentary at hand. First, this court is mindful of the Supreme Court's admonition that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958)). Second, statements by isolated Senators and Representatives are entitled to limited weight in determining the will of the entire law-making body. *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). In light of these two admonitions, this court cannot take the comments of Senator Kerry and Representative Wexler to indicate adequately that the 91st Congress clearly abrogated the revenue rule when it passed RICO, however forceful their belief that it did.

3. The RICO Claims Predicated On Smuggling Fail

Plaintiffs have not demonstrated adequate evidence that RICO abrogated the revenue rule. Consequently, Plaintiffs' RICO claims predicated on smuggling grounds fail as a matter of law.

B. The Common Law Claims Predicated On Allegations of Smuggling

As with the RICO claims, the common law claims are predicated on both smuggling and money laundering grounds. In this section of the opinion, the court will consider the

claims as they are brought pursuant to smuggling grounds, and will consider the claims as they are brought pursuant to money laundering grounds under Part IV of the opinion.

1. The Revenue Rule Applies to Common Law Claims

As a rule of common law, the revenue rule applies to common law rights of action. Once triggered, the revenue rule will bar a common law right of action from proceeding, absent an indication in the case law that the right of action is not affected by the revenue rule.

Plaintiffs bring five common law claims: common law fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation. Plaintiffs make no showing, and this court finds no demonstration in the case law, that any of these claims are immune to the revenue rule. Consequently, Plaintiffs must satisfy this court that adjudicating the common law claims will not cause this court to pass on foreign revenue laws. Plaintiffs, however, can make no such showing; as discussed, *supra,* adjudication of Defendants' smuggling activities will necessarily cause this court to pass on the applicability of foreign tax laws in making a determination that Defendants in fact engaged in smuggling.

IV. The Money Laundering Grounds

The court now turns to Plaintiffs' RICO and common law claims predicated on allegations of money laundering.

Appendix B

A. The RICO Claims

1. Plaintiffs Must Adequately Allege Causation Between the Harm and the Underlying Action

The Supreme Court has stated that a "plaintiff's right to sue under [18 U.S.C.1964(c)] require[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Discussing the *Holmes* standard, the Second Circuit has held, "[t]he test of proximate cause, as we summarized it in *Hecht,* is whether the defendant's acts 'are a substantial factor in the sequence of responsible causation,' and whether 'the injury is reasonably foreseeable or anticipated as a natural consequence.'" *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102, 104 (2d Cir.1993) (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23- 4 (2d Cir.1990)).

Holmes offers three reasons behind the proximate cause threshold:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. . . . Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the

> violative acts, to obviate the risk of multiple recoveries. . . . And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269.

As discussed below, even under the generous standards for a motion to dismiss, Plaintiffs' complaint fails to meet the proximate cause threshold for the RICO claims predicated on grounds of money laundering.[5]

2. The RICO Claims Predicated On Grounds of Money Laundering Do Not Meet the *Holmes* Test

In the complaint before the court, the harm visited on Plaintiffs by Defendants' money laundering is only coherently alleged in concert with the smuggling scheme. On the pleadings, the only apparent connection between the injury asserted and the allegations of money laundering is the harm visited by money laundering as a link in the smuggling chain. As discussed in Part III of this opinion, however, adjudication of the smuggling scheme will require that this court pass

5. As Plaintiffs' claims for injunctive relief under RICO are predicated solely on the smuggling grounds, this court does not address the applicability of *Holmes* to application for injunctive relief under RICO.

impermissibly on the applicability of foreign revenue laws to Defendants' actions. Consequently, the revenue rule bars this court from hearing money laundering claims that, to show harm, will cause this court to adjudicate the smuggling scheme.

Stripped of the harms suffered from smuggling, the complaint offers no additional, distinct causal connection between the allegations of money laundering and the injuries asserted. Simply put, Plaintiffs' complaint attacks a smuggling scheme. The money laundering claims are merely asserted as part of the overarching claims of injury from smuggling. Deprived of that context, Plaintiffs' particular money laundering claims lose all connection to the injuries alleged. While there may yet exist a discreet connection between money laundering and harm suffered by Plaintiffs, this court cannot divine that connection.[6] In sum, where this court is not asked to pass on foreign revenue rules, this court is not presented with the necessary causal connection between Defendants' underlying money laundering actions and the injuries of which Plaintiffs complain.[7]

---

6. Plaintiffs' failure with respect to the money laundering grounds is exacerbated by the vague nature of many of the injuries asserted, *e.g.*, those claims asserting as injury the compromised integrity of Plaintiffs' various institutions and markets. While such broad allegations of injury may be appropriate with respect to a widespread smuggling scheme, such allegations simply do not make sense, as presented, in the context of specific claims involving money laundering.

7. This finding is supported by analysis of the reasons given in support of the *Holmes* test. With respect to the first reason, to proceed

(Cont'd)

Appendix B

B. The Common Law Claims

Plaintiffs bring common law claims for common law fraud, public nuisance, unjust enrichment, negligence, and negligent misrepresentation. The underlying allegations and injuries are identical to those underlying the RICO claims. The common law claims, like the RICO claims, fail for lack of causal connection to the harm alleged, once the money laundering allegations are removed from the context of the smuggling scheme pursuant to the revenue rule.

1. The Legal Standard

To sufficiently assert a right of action under the common law, Plaintiffs must, at the least, establish three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical,'. . . . Second, there must be a

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(Cont'd)
on the money laundering grounds alone, especially in light of the extremely broad injuries alleged, would render proper assessment of damages a likely impossible task. With respect to the second reason given, assigning liability despite the attenuated connection between the money laundering and asserted injuries in the complaint, as it is written, may well expose Defendants to numerous claims stemming from the particular acts. Finally, with respect to the third reason, dismissing these claims will not necessarily deter future claims asserting a cognizable link between Defendants' money laundering activities and consequent injuries.

> causal connection between the injury and the conduct complained of— the injury has to be fairly traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quotations omitted). Furthermore, "[the *Holmes* proximate causation] principles also apply in general terms to the fraud . . . causes of action asserted by plaintiffs under New York law." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 242-43 (2d Cir.1999) (citing *Ferguson v. Green Island Contracting Corp.*, 36 N.Y.2d 742, 743 (1975)); *Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp.*, 26 A.D.2d 9, 12 (1st Dep't 1966); *Pulka v. Edelman*, 40 N.Y.2d 781, 785 (1976).

2. The Common Law Claims Predicated On Grounds of Money Laundering Do Not Meet the *Lujan* and *Laborers Local 17* Tests

The underlying allegations of money laundering are identical in Plaintiffs' common law and RICO claims. As discussed above, the money laundering allegations are stripped of their causal connection to Plaintiffs' injuries by this court's inability to adjudicate with respect to the greater smuggling enterprise. Without that causal context, Plaintiffs' common law pleadings meet neither the *Lujan* nor the *Laborers Local 17* standard.

Appendix B

Under *Laborers Local 17,* the common law actions for fraud must meet the heightened *Holmes* test. Here, all of the common law actions are based on the same set of pleadings that failed the *Holmes* test above. Thus, the fraud causes of action—common law fraud, unjust enrichment, and negligent misrepresentation—are ruled out by this court's holding with respect to the RICO claims predicated on money laundering, which claims did not meet the *Holmes* test. *See also Bennett v. United States Trust Co. of New York,* 770 F.2d 308, 316 (1985).

Furthermore, after the revenue rule, the remaining common law claims based on money laundering cannot meet the minimal requirements of *Lujan,* even under the relaxed review of a motion to dismiss.[8] The public nuisance and negligence claims, asserting broad damage remote from isolated money laundering transactions, and without the context of the smuggling scheme, cannot be called fairly traceable to the challenged actions of Defendants.[9] To hold otherwise would essentially put this court in the position of re-pleading Plaintiffs' claims for them. This court, naturally, declines that role.

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8. Again, the connection between Plaintiffs' injuries and Defendants' money laundering activities may be adequately clear when viewed in the context of the greater smuggling scheme, but this court may only view the claims independent of claims that will cause this court to pass on foreign revenue rules. In this more narrow context, as discussed above, the money laundering allegations do not show connection to Plaintiffs' injuries.

9. The same is true of all of Plaintiffs' common law claims based on money laundering. Thus, even if *Laborers Local 17* does not dispose of the common law fraud, unjust enrichment, and negligent misrepresentation claims, the claims must still fail as a matter of law.

Appendix B

Conclusion

For the reasons stated above, Defendants' motions are granted. Plaintiffs' RICO and common law claims predicated on Defendants' smuggling scheme are DISMISSED with prejudice, and Plaintiffs' RICO and common law claims predicated on Defendants' money laundering transactions are DISMISSED without prejudice to replead.

SO ORDERED.

s/ Nicholas G. Garaufis
Nicholas G. Garaufis
United States District Judge

Dated: February 19, 2002
Brooklyn, New York

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED MARCH 21, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

02-CV-00164 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

JAPAN TOBACCO, INC., et al.,

Defendants.

01-CV-05188 (NGG)

THE EUROPEAN COMMUNITY, et al.,

Plaintiffs,

v.

RJR NABISCO, INC., et al.,

Defendants.

Appendix C

00-CV-02881 (NGG)

DEPARTMENT OF AMAZONAS, et al.,

Plaintiffs,

v.

PHILIP MORRIS COMPANIES, INC., et al.,

Defendants.

GARAUFIS, District Judge.

Now before this court is a Fed. R. Civ. P. 59(e) motion brought by defendants in the following two of the above-titled cases: *The European Community, et al. v. RJR Nabisco Inc., et al.*, and *Dep't of Amazonas, et al. v. Phillip Morris Cos., Inc., et al.* Defendants seek to amend and clarify the Judgment entered by the clerk of the court on February 25, 2002, pursuant to this court's Memorandum and Order of February 19, 2002. Because the Memorandum and Order of February 19, 2002, and the Judgment of February 25, 2002, dealt equally with all three of the above-titled cases, this court *sua sponte* applies this Order to the above-titled *The European Community, et al. v. Japan Tobacco, Inc., et al.* as well.

This court hereby ORDERS that the Clerk of the Court for the Eastern District of New York AMEND the Judgment of February 25, 2002, to clarify the following: that the plaintiffs shall take nothing of the defendants; that the

defendants' motions to dismiss the complaints are granted in their entirety; that the plaintiffs' RICO and common law claims on the defendants' smuggling scheme are dismissed with prejudice; and the plaintiffs' RICO and common law claims on the defendants' money laundering transactions are dismissed without prejudice.

SO ORDERED.

_____

Nicholas G. Garaufis
United States District Judge

Dated: March 21, 2002
Brooklyn, New York

(3)

Supreme Court, U.S.
FILED
JUN 16 2004
OFFICE OF THE CLERK

No. 03-1427

IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,
Petitioners,

v.

RJR NABISCO, INC., *et al.*,
Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,
Petitioners,

v.

PHILIP MORRIS USA INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Revenue Rule, which bars a foreign government from directly or indirectly enforcing its revenue laws in the courts of another country, precludes these suits by foreign governments to obtain injunctive relief designed to enforce foreign revenue laws in U.S. courts.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondents R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., and RJR Acquisition Corp. have the following parent corporation: R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. Invesco Asset Management Limited, and Capital Research and Management own 10% or more of R.J. Reynolds Tobacco Holdings, Inc., stock.

With respect to Respondents British American Tobacco (Investments) Limited, British American Tobacco (South America) Limited, B.A.T Industries p.l.c., BATUS Tobacco Services, LLC, and Brown & Williamson Tobacco, no publicly held company directly owns 10% or more of the stock of any of the Respondents, but 10% or more of each of their stock is indirectly held by British American Tobacco p.l.c., which is a publicly held company. In addition, the Respondents' parent corporations that are not Respondents are: British American Tobacco p.l.c., British American Tobacco (1998) Limited, British American Tobacco (Holdings) Limited, Louisville Securities Limited, BATUS Holdings, Inc. and BATIC, Inc.[1]

Respondent Altria Group, Inc., f/k/a Philip Morris Companies Inc., does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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1. B.A.T Industries p.l.c., British American Tobacco (South America) Ltd., and BATUS Tobacco Services, LLC, join this Opposition subject to, and without waiver of, their defenses including the lack of personal jurisdiction.

Respondents Philip Morris USA Inc., f/k/a Philip Morris Incorporated, and Philip Morris International Inc., have the following parent corporation: Altria Group, Inc. No other publicly held company owns 10% or more of their stock.

Respondents Philip Morris Products Inc. and Philip Morris Duty Free Inc. have the following parent corporation: Philip Morris International Inc. No other publicly held company owns 10% or more of their stock.

Respondent Philip Morris Latin America Sales Corporation has the following parent corporation: Philip Morris LA Holding Inc., f/k/a Philip Morris Latin America Inc. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

The United States Court of Appeals for the Second Circuit held below that the long-standing Revenue Rule barred these civil suits by various foreign governments to collect foreign taxes and obtain related relief in U.S. courts. App. 30a. That ruling is consistent with more than 200 years of case law from around the world and with every state and federal decision in this country, including two circuit decisions addressing the exact issues presented here. *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1256 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1075 (2004); *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). The Court denied certiorari in both of these prior cases. *See Republic of Honduras*, 124 S. Ct. 1075; *Attorney Gen. of Can.*, 537 U.S. 1000. Nothing has changed since the Court denied certiorari in *Canada* and *Honduras* that warrants the Court's review here.

In *Canada*, the United States – in a joint submission by the Solicitor General, the Department of State, and the Department of Treasury – also agreed that the Revenue Rule barred such suits and urged the Court to deny certiorari. *See* Brief of the United States As Amicus Curiae at 9, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01-1317) (opposing certiorari). The United States recognized that the Revenue Rule is compelled by important separation of powers concerns: the decision whether, when, and how to allow a foreign government to enforce its tax laws in U.S. courts is a matter for the political branches to define through treaty. *Id.* The Rule prevents a foreign government from circumventing the treaty process and obtaining greater assistance than it

has negotiated for and greater assistance than the United States would receive in foreign courts. Allowing these claims would impermissibly interfere with the political branches' foreign policy and treaty making authority. *See id.* at 10.

In view of the unanimity of the circuits, the United States's approval of these decisions, and the Court's two prior denials of certiorari, this case clearly is unworthy of review, and it is therefore not surprising that petitioners do not ask for a grant of review in the first instance. Instead, petitioners ask the Court to hold this case pending its decision in *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 1875 (2004). However, a decision to hold would be unwarranted because that case involves the application of the Revenue Rule to a federal *criminal* prosecution, which does not raise the same separation of powers concerns. In a federal criminal prosecution, the Executive Branch itself can assess any foreign policy implications in determining whether or not to prosecute. No such opportunity exists in a civil case brought by a foreign government.

Not one U.S. court has allowed a civil suit like this one to proceed. The United States agrees that suits like this one should not proceed. The parties in *Pasquantino* agree that the Revenue Rule applies in the civil context, and that suits like this one should not proceed. Even the *Pasquantino* court was careful to acknowledge that its ruling refusing to apply the Revenue Rule applied only in the criminal context and suggested that the Rule should apply to a civil suit brought by a foreign government seeking to vindicate foreign tax laws. *See Pasquantino*, 336 F.3d at 331. The issue presented here is simply not at issue in *Pasquantino*. There is no reason

for the Court to revisit the Revenue Rule in this civil context or to hold the petition in light of *Pasquantino*, as petitioners request. Pet. at 8.

STATEMENT OF THE CASE

I. These Actions Involve Efforts By Foreign Governments To Enforce Their Revenue Laws In U.S. Courts

In these consolidated lawsuits, several Departments of the Republic of Colombia ("Colombian Departments"), the European Community ("EC"), and ten of the EC's member states ("Member States") sought to recover unpaid foreign taxes and obtain related relief arising from alleged cigarette smuggling schemes in various foreign lands.[2] Petitioners alleged, among other things, that the respondent companies facilitated the smuggling of cigarettes illegally into their countries. App. 6a-7a.

In their complaints, petitioners sought principally to recover taxes allegedly lost by reason of the alleged schemes. App. 8a. Specifically, petitioners sought to recover as damages (1) "excise taxes that would have been paid on the

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2. In July 2001, the district court dismissed the EC's original action, holding that the EC lacked standing to bring its tax-based claims under RICO. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001). Three weeks later, the EC filed a second complaint, virtually identical to the first, seeking the same tax-related losses and injunctive relief. In this second complaint, ten of the EC's Member States joined the suit, asserting identical claims. App. 8a-9a. Five of the EC's (then-fifteen) Member States – Austria, Denmark, Ireland, Sweden and the United Kingdom – did not join the lawsuit.

cigarettes in question absent the wrongful activities of the Defendants"; (2) "[c]ustoms duties"; (3) "[v]alue-added tax levied on cigarettes"; and (4) derivative costs such as law enforcement and other governmental expenses incurred "to fight against cigarette smuggling." A-409-11; *accord* A-2021-26.[3] Petitioners sued under the civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1996) and brought supplemental state common law claims.

In this Court, however, petitioners wholly ignore their RICO claims and their claims for damages, apparently recognizing that those claims are barred by the Revenue Rule. Instead, they premise their entire case on state common law torts based on diversity jurisdiction and purport to seek only equitable relief. *See* Pet. at 2-4.[4]

II. Courts Uniformly Have Rejected Identical Suits By Canada and Other Countries

While these consolidated actions were pending in the district court, the Second Circuit decided *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). There, Canada filed a civil RICO and state common law action in

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3. In this brief, "A" refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

4. Diversity jurisdiction, however, is lacking in the Colombian Departments' action because there is no complete diversity – there are foreign parties on both sides of the case. *See Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1923 (2004) (diversity is absent where "aliens [are] on both sides of the case") (citing *Mossman v. Higginson*, 4 U.S. 12, 14 (1800)).

the Northern District of New York, based on alleged tax-related injuries resulting from a cigarette smuggling scheme. *Id.* at 106. Like petitioners here, Canada sought to recover unpaid taxes and requested injunctive relief designed to enforce its tax laws. *Id.*

The Second Circuit held that the Revenue Rule – a "longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated claims of other sovereigns" – barred all of Canada's claims, including those for injunctive relief. *Id.* at 109. The court explained that the Revenue Rule is grounded on constitutional principles of separation of powers: "When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to – and better handled by – the political branches of government." *Id.* at 114.

Reviewing U.S. policy on tax assistance treaties stretching back to the 1930's, the Second Circuit concluded that "the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119. The Court of Appeals determined that, by filing the civil suit, the government of Canada was seeking a form of foreign tax collection assistance that it had been denied by treaty. If the suit were allowed, it would completely nullify the limits on such assistance as negotiated and imposed by the political branches of government in the U.S.-Canadian tax treaty. *Id.* at 122. In essence, to allow the suit "would potentially allow Canada to obtain assistance it has not negotiated for and that would be greater than the

assistance our government would likely receive as a litigant in Canada's courts." *Id.* Accordingly, the court affirmed the dismissal of Canada's claims, cautioning that "courts must be wary of intruding in a way that undermines carefully conceived and negotiated policy choices." *Id.* at 120.

Canada subsequently filed a petition for a writ of certiorari, and the Court invited the Solicitor General to express the views of the United States. On behalf of the United States, the Solicitor General – in a joint submission with the Departments of State and Treasury – opposed the granting of certiorari and supported the Second Circuit's application of the Revenue Rule based on "important separation-of-powers interests." Brief of the United States As Amicus Curiae at 6, *Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 537 U.S. 1000 (2002) (No. 01-1317) ("U.S. *Amicus* Br."). The Court ultimately denied certiorari. *Attorney Gen. of Can.*, 537 U.S. 1000.

Following the filing of the *Canada* case, various Latin American countries brought identical actions in the Southern District of Florida. Like the Second Circuit, the Eleventh Circuit affirmed the dismissal of these suits based on the Revenue Rule. *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003). Plaintiffs there also filed a petition for a writ of certiorari, which the Court denied. *Republic of Honduras v. Philip Morris Cos.*, 124 S. Ct. 1075 (2004).

III. The Proceedings Below

A. The District Court's Decision Below

Following the Second Circuit's decision in *Canada*, the district court dismissed petitioners' complaints based on the Revenue Rule. App. 42a. The court specifically considered the Revenue Rule's application to claims for injunctive relief. App. 43a. Noting that petitioners' requested injunctive relief was "designed to impede smuggling, improve future defenses against smuggling, and recoup monies lost to smuggling," the court determined that this relief also triggered the Revenue Rule. App. 43a. As with claims for damages, the court "'would have to examine whether, when and to what extent the smuggling existed, which would require a determination that tax laws were applicable to defendants.'" App. 42a (quoting *Attorney Gen. of Can.*, 268 F.3d at 133).

Consequently, the district court dismissed with prejudice petitioners' RICO and common law claims predicated on smuggling. App. 61a.[5] Petitioners appealed the dismissal to the Second Circuit.

B. The Second Circuit's Decision Below

The Second Circuit affirmed the dismissal of the present cases. App. 30a. The court found that petitioners' allegations were "markedly similar to those at issue in *Canada*." App. 15a. Like Canada, the court noted, petitioners premised

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5. Finding no causal connection to the alleged harm when stripped from the context of the smuggling claims, the district court dismissed petitioners' "money laundering" claims without prejudice. App. 55a-57a, 64a. Petitioners subsequently have refiled those claims against certain defendants.

their complaints on various tax-related injuries. App. 15a. Accordingly, the court found its decision controlled by *Canada*. App. 16a.

The Second Circuit rejected petitioners' argument that the foreign policy concerns underlying the Revenue Rule were not implicated in this case. App. 15a-16a. *First*, the court reiterated that enforcement of foreign tax laws is a question of "'foreign relations policy . . . assigned to – and better handled by – the political branches of government.'" App. 13a (quoting *Attorney Gen. of Can.*, 268 F.3d at 123). Thus, "the modern revenue rule is rooted in both our perception that the branches of government responsible for conducting foreign affairs wish to uphold the rule, and our reluctance to intrude upon the greater expertise of the political branches." App. 14a. The court rejected petitioners' reliance on various non-tax treaties such as the Vienna Convention and Palermo Convention. App. 24a n.7. Instead, like the Eleventh Circuit, the court found that the over 50 tax treaties between the United States and other nations "reflected the political branches' continuing recognition of the revenue rule." App. 14a.

Second, the court rejected petitioners' argument that their claims for injunctive relief fell beyond the scope of the Revenue Rule. The court found that the same separation of powers problems arise irrespective of whether the remedy sought is damages or injunctive relief:

> [T]he requested injunctions would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages, as plaintiffs would have the court order the defendants to cease their smuggling operations,

> disgorge their profits, and put into place measures that would allow foreign customs officials to ensure that they are complying with those nations' revenue laws. Thus, the requested relief, though different in form, has the same implications as plaintiffs' claims for damages, and is barred by the revenue rule.

App. 27a. Accordingly, the court concluded that petitioners' claims for injunctive relief "would require the court to evaluate and interpret foreign tax laws" and were therefore barred by the Revenue Rule. App. 27a.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Application Of The Revenue Rule Creates No Conflict Warranting The Court's Review

A. There Is No Conflict On The Revenue Rule's Application To Civil Suits By Foreign Governments

The decision below does not conflict with a decision of this Court, any Court of Appeals, or for that matter, any court anywhere in the world. Both the Second Circuit and Eleventh Circuit have now squarely considered the Revenue Rule's application to civil suits to recover taxes, and both have reached the same conclusion: as a matter of foreign relations and separation of powers, civil actions by foreign governments seeking to enforce their revenue laws, directly or indirectly, in U.S. courts are barred by the Revenue Rule. That includes not only actions seeking to collect foreign taxes, but also those seeking injunctive relief designed to

enforce foreign tax laws. App. 27a; *Republic of Honduras*, 341 F.3d at 1257-59; *Attorney Gen. of Can.*, 268 F.3d at 118-19. Within the last two years, the Court twice has refused to grant certiorari in these cases to review this long-settled principle. The Court should reach the same result here.

B. There Is No Conflict That The Revenue Rule Applies To Claims For Injunctive Relief

In response to this unanimity among the circuit courts, petitioners attempt to create a conflict on the issue of equitable relief. Trying to avoid the Revenue Rule by ignoring their damages claims – the heart of their complaints – and limiting the relief sought to equitable relief, petitioners claim that there are "several conflicts" over whether the Revenue Rule applies to claims for injunctive relief. Pet. at 20-26. Not one of these purported conflicts exists. Moreover, claims for injunctive relief implicate the separation of powers concerns underlying the Revenue Rule just as much – if not more so – as claims for damages.

First, petitioners misleadingly claim that the holding below "conflicts" with the holdings of the Fourth and Ninth Circuits. Pet. at 12. However, there is no "holding" by the Fourth or Ninth Circuits regarding claims by foreign governments for injunctive relief. The cases cited by petitioners did not involve claims for injunctive relief at all. *See United States v. Pasquantino*, 336 F.3d 321, 330 (4th Cir. 2003) (en banc) (addressing federal wire fraud prosecution) (cited in Pet. at 12); *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161, 1165-66 (9th Cir. 1979) (addressing suit by foreign government to enforce tax judgment) (cited in Pet. at 12). Nor do any of the foreign cases cited by petitioners

address such relief. *See* Pet. at 12-13 (citing *In re State of Norway's Application*, 1 A.C. 723, 807-08 (H.L. 1990); *United States v. Harden*, [1963] S.C.R. 366, 372-73; *Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89, *available at* [1955] A.C. 516, 526 (Ir. H. Ct. 1950)).[6]

Second, petitioners claim that the application of the Revenue Rule to claims for injunctive relief conflicts with the Court's decision in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). *See* Pet. at 11-12. *Milwaukee County* did not involve unadjudicated tax claims by a foreign government. Rather, *Milwaukee County* stands for the unremarkable proposition that, under the Full Faith and Credit Clause, one state will enforce a tax judgment from another state. *Milwaukee County*, 296 U.S. at 277. As the Second Circuit acknowledged, *Milwaukee County* "distinguished the obligations of the states of the union from those of independent foreign sovereigns . . . which are 'free to ignore obligations created under the laws or by the judicial proceedings of the others.'" *Attorney Gen. of Can.*, 268 F.3d at 127 n.29 (quoting *Milwaukee County*, 296 U.S. at 277).

Third, petitioners claim that the denial of injunctive relief "conflicts with U.S. policy and practice." Pet. at 14. Citing a handful of cases, petitioners assert that the United States

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6. Citing these cases, petitioners claim that the Second Circuit's decision "conflicts with the decisions of the high courts of the United Kingdom, Ireland and Canada." Pet. at 12. To the contrary, not one of petitioners' foreign decisions addressed – or allowed – a claim for injunctive relief to enforce foreign tax laws. Indeed, in *Peter Buchanan*, the Irish High Court explained that, in applying the Revenue Rule, "it is not the form of the action . . . that must be considered, but the substance of the right sought to be enforced." [1955] A.C. at 527.

"routinely" seeks injunctive relief in foreign courts to address schemes to defraud the United States. Pet. at 14-15. However, *not one* of petitioners' citations involved an attempt to obtain injunctive or other equitable relief to address violation of U.S. revenue laws.[7] In its *Amicus* Brief filed with this Court in the *Canada* case, the United States expressly agreed that claims for injunctive relief, like those presented here, are barred by the Revenue Rule. U.S. *Amicus* Br. at 14 n.1. Contrary to petitioners' claim, the United States did not "declin[e] to state a view" concerning the application of the Revenue Rule to claims for injunctive relief. Pet. at 25 n.10. Rather, the United States expressly recognized that such "claims for equitable relief seek to vindicate the same interest in avoiding tax loss and increased law enforcement costs as do petitioner's claims for damages." U.S. *Amicus* Br. at 14 n.1.

Thus, as the United States recognized, claims for both damages and equitable relief seek foreign tax enforcement

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7. Most of these decisions involved SEC enforcement actions for securities fraud. *See SEC v. Shull, available at* [1999] CarswellBC 1772 (In Chambers) (securities fraud); *SEC v. Warren & Assocs., Inc.*, SEC Litigation Release No. 15468 (Sept. 2, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15468.txt; *SEC v. Dunne Finance Ltd.*, SEC Litigation Release No. 15300 (Mar. 18, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15300.txt; *SEC v. Antar*, SEC Litigation Release No. 15251 (Feb. 10, 1997) (same), *available at* http://www.sec.gov/litigation/litreleases/lr15251.txt. One case involved telemarketing fraud. *United States v. Levy*, [1999] 45 O.R.3d 129. Another case involved the enforcement of a final civil judgment for environmental clean up costs under CERCLA. *United States v. Ivey*, [1995] 26 O.R.3d 533, *aff'd*, [1996] 30 O.R.3d 370. The final citation, *The Sapphire*, 78 U.S. (11 Wall) 164 (1870), likewise did not involve any claim for taxes or duties, but was a damages action based on a ship accident.

assistance denied by treaty, undermining the Executive Branch's treaty-making authority. The end result of petitioners' claim for injunctive relief would be to allow petitioners to circumvent specific treaty limitations on extraterritorial tax enforcement by providing greater assistance than petitioners negotiated in their treaties. Petitioners' requested injunctions "would have the effect of extraterritorially enforcing plaintiffs' tax laws just as directly as would their claims for damages." App. 27a.[8] Petitioners' request is exactly what the Revenue Rule was designed to prevent: granting a foreign government greater assistance than that which the United States was willing to provide after careful deliberation.

In short, every court to consider this issue has concluded that a plaintiff cannot evade the Revenue Rule simply by requesting injunctive relief instead of damages. App. 27a; *accord Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359, 1365 n.4 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003). The last-minute revisions to petitioners' claims provide no basis for the Court's review.

II. There Is No Reason To Hold This Case Pending Resolution Of The Revenue Rule's Application To Federal Criminal Actions At Issue In *Pasquantino*

In another attempt to breathe life into this case, petitioners manufacture yet another non-existent "conflict" and ask the Court to hold this petition pending the Court's decision in *Pasquantino*, which allowed a federal *criminal* prosecution involving alleged foreign smuggling to proceed

8. Notably, in the decision below even Judge Calabresi, who dissented in *Canada*, agreed that the Revenue Rule applied equally to claims for injunctive relief.

in the face of a Revenue Rule challenge. Pet. at 10-11. *Pasquantino* is a categorically different case. The United States, in deciding to prosecute that case, evaluated any foreign policy implications raised by that suit. By contrast, this case – like all civil cases by private plaintiffs – does not carry the imprimatur of the foreign policy-making branches of the federal government. Accordingly, *Pasquantino* has no bearing on the present case.

Both parties in *Pasquantino* agree that the Revenue Rule bars suits like the one here – *i.e.*, civil suits brought by foreign governments seeking tax enforcement assistance. *See* Petition for Certiorari at 27-28, *United States v. Pasquantino*, 124 S. Ct. 1875 (2004) (No. 03-725); Brief for the United States in Opposition at 9-11, *United States v. Pasquantino*, 124 S. Ct. 1875 (2004) (No. 03-725) ("*Pasquantino* Opposition"). The issue raised by petitioners here, therefore, will not be presented in *Pasquantino*. In light of the Circuit Courts of Appeals' complete agreement that the Revenue Rule applies in civil cases, the Court should deny petitioners' request to hold their petition pending resolution of *Pasquantino*. *See Republic of Honduras*, 341 F.3d at 1259-60; *Attorney Gen. of Can.*, 268 F.3d at 106.

Indeed, even those courts that have refused to apply the Revenue Rule in the criminal context have recognized that entirely different considerations apply in the civil context. In *Canada*, for example, the Second Circuit held that the Revenue Rule does not apply in the criminal context but does apply in the civil context because of different separation of powers concerns. The Second Circuit explained that, when the United States prosecutes a criminal action, such an action "is subject to the oversight of the executive branch" and foreign relations interests of the United States are

"accommodated." *Attorney Gen. of Can.*, 268 F.3d at 123. By contrast, when a foreign government brings a civil action, such an action "may be, but is not necessarily, consistent with the policies and interests of the United States." *Id.* The Second Circuit in its decision below reiterated this fundamental distinction:

> [W]here the executive branch has "expressed its consent to adjudication by the courts," the institutional and separation of powers concerns behind the rule are mitigated, because the branch with primary responsibility for conducting foreign relations has indicated that extraterritorial enforcement of the foreign tax laws at issue is in the interests of the United States. . . . [E]xecutive consent may be found where the United States itself institutes a prosecution designed to punish those who have defrauded foreign governments of tax revenues.

App. 14a (quoting *Attorney Gen. of Can.*, 268 F.3d at 113, 123 n.25).

In *Pasquantino*, the Fourth Circuit similarly recognized that a criminal prosecution under a federal statute allows the "two branches of our federal government charged by our Constitution with the power to make foreign policy decisions" to pass upon any questions of foreign policy implicated by the suit. 336 F.3d at 331. The *Pasquantino* Court concluded that "prosecution for violation of the federal wire fraud statute . . . does nothing civilly . . . to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant." *Id.*

The United States also has recognized that civil actions present an "entirely different question" from the issues presented in a criminal wire fraud prosecution. *Pasquantino* Opposition at 9. The United States takes the position that federal criminal prosecutions "vindicate the interests of the United States, and they are subject to Executive Branch control." U.S. *Amicus* Br. at 16. By contrast, "a foreign sovereign brings a civil RICO action to further its own interest in collecting taxes, and that interest is not . . . necessarily consistent with the interests of the United States." *Id.* The United States has concluded that "the application of the revenue rule by the Second Circuit properly respects the different roles of the courts and the political branches in matters involving foreign taxes." *Id.* at 7.

In short, the Court's decision on the question presented in *Pasquantino* will not affect this case. There is no reason to hold this case pending consideration of the fundamentally different issue of the Revenue Rule's application to criminal prosecutions.

III. Petitioners' Remaining Issues Do Not Provide A Basis For This Court's Review

A. The Revenue Rule Is An Important Common Law Doctrine Supported By Constitutional Principles

Unable to establish any conflict to justify the Court's discretionary review, petitioners attack the very foundation of the Revenue Rule. Pet. at 17-19. This too fails.

As the United States explained in its *Amicus* Brief in *Canada*, the "revenue rule serves important separation-of-

powers interests that transcend the particular context of the present action by Canada." U.S. *Amicus* Brief at 6-7. Specifically, the "rule avoids involving the judiciary in making judgments about foreign tax policies and procedures and interwoven foreign policy considerations, and it leaves the Executive Branch and the Senate free to decide through the treaty-making process the extent to which exceptions to that principle should be recognized." *Id.* at 7.

The United States negotiates tax treaties with foreign governments against the backdrop of the Revenue Rule. *See Attorney Gen. of Can.*, 268 F.3d at 115-19. Allowing suits like these to proceed would completely undermine the United States's bargaining power in negotiating future tax collection assistance treaties, including its ability to obtain reciprocal rights. *See id.* at 122. For instance, the United States recently negotiated an agreement with the national Colombian government, which provides for limited information sharing on tax issues. *See* Agreement for the Exchange of Tax Information, Mar. 30, 2001, U.S.-Colom., 2001 WTD 88-16 (Tax Analysts Doc. 2001-12474). Petitioners cannot explain why the Departments – political subdivisions of the Republic of Colombia that do not have any tax treaty with the United States – should have *greater* rights to tax enforcement assistance than those the United States agreed to give the national Colombian government. Nor, for that matter, can petitioners explain why the Colombian Departments should be entitled to greater rights in American courts than the United States would receive in Colombian courts. Indeed, not one foreign

court grants the United States the tax enforcement rights petitioners seek here.[9]

Similarly, the *EC* case, if allowed to proceed, would provide the Member States with tax assistance *denied* to them by treaty. The United States has separate treaties with each of the Member States in this suit "providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested here." *Attorney Gen. of Can.*, 268 F.3d at 113. These tax treaties with the Member States are not uniform, but reflect U.S. foreign policy and reciprocity considerations unique to each country. Not one of those treaties authorizes enforcement of unadjudicated tax claims in U.S. courts.[10] In the end, petitioners' proper recourse is to

9. *See, e.g.*, *QRS 1 Aps v. Frandsen*, 3 All E.R. 289 (C.A. 1999), *available at* [2000] I.L. Pr. 8, 14 (C.A.) (noting that the Revenue Rule "'is deeply embedded not only in the common law, but also in the law of civil law countries'") (citation omitted); *accord Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] A.C. 368, 428 (H.L.) ("[A]t present the international rule with regard to the non-enforcement of revenue and penal laws is absolute."); *Peter Buchanan Ltd.*, [1955] A.C. at 526 ("[T]he courts of our country will not enforce the revenue claims of a foreign country."). Indeed, the Member States themselves have executed a multilateral treaty in which they endorse and retain the Revenue Rule in their own jurisdictions. *See* European Communities: Convention On Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, July 28, 1990, art. 1, 29 I.L.M. 1413, 1418.

10. Those tax treaties and agreements – and the 51 other tax treaties entered into by the United States – overwhelmingly demonstrate the political branches' "intent[] to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Attorney Gen. of Can.*, 268 F.3d at 119; *see also id.* at 119 n.16 (Cont'd)

the political branches or their own courts. *See id.* at 135. What they cannot do is bring these foreign tax claims in U.S. courts.

Petitioners recently filed a Supplemental Brief bringing the Framework Convention on Tobacco Control ("FCTC") to the Court's attention. Petitioners argue that the FCTC "provides compelling new evidence – unavailable to the Court of Appeals – that the Executive Branch expressly favors broad 'cooperation' with foreign States in connection with 'proceedings' initiated by foreign States to eliminate cigarette smuggling." Pet'rs Supplemental Br. at 2. Petitioners misstate both the record below and the import of the FCTC.

First, contrary to petitioners' assertion, the FCTC demonstrates the United States's continued adherence to the Revenue Rule. In negotiations on the FCTC, the U.S. delegation objected to a draft provision that would have imposed extraterritorial liability for duties and taxes.[11]

(Cont'd)
(collecting treaties). The Second Circuit properly rejected petitioners' reliance on various non-tax treaties, such as the Vienna Convention and Palermo Convention. *See* App. 27a n.7. Petitioners blatantly misstate the text of these non-tax treaties. Pet. at 17-19. Nowhere do these treaties expressly or implicitly address, mention, or relate to extraterritorial tax enforcement.

11. *Compare* Framework Convention Alliance Briefing Papers INB3, *Smuggling-Related Provisions of the FCTC: Recommended Text* § J, *at* http://fctc.org/about_FCTC/INB3/INB3brief_smuggle.pdf (Oct. 5, 2001), *with* Minority Staff, Committee on Government Reform, U.S. House of Representatives, *U.S. Positions on Selected Issues at the Third Negotiating Session of the Framework Convention on Tobacco Control* Addendum A, *at* http://www.house.gov/reform/min/pdfs/pdf_inves/ pdf_tobacco_accord_positions_rep.pdf (Mar. 5, 2002).

The objectionable provision was not included in the final treaty.[12] Rather – consistent with most U.S. tax treaties – the final text only provides for information exchange among government agencies. *See* FCTC arts. 15(4)(a), 15(6), *at* http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf.

Second, the FCTC is not yet in force. Although the United States signed the FCTC on May 10, 2004, the treaty remains unratified and has not been submitted to the Senate. *See SEC v. Int'l Swiss Invs. Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990) ("An unratified treaty has no force until ratified by a two-thirds vote of the Senate."); *see also* Press Release, U.S. Dep't Health & Human Servs., *United States Signs Tobacco Control Treaty*, *available at* http://www.hhs.gov/news/press/2004pres/20040511.html (May 11, 2004) (noting FCTC will not be submitted to Senate until after completion of interagency review) (Pet'rs Supplemental Br. at 4a).

Finally, there is nothing "new" about the FCTC. *Cf.* Pet'rs Supplemental Br. at 2, 4. The FCTC was raised in the proceedings below, and discussed in the parties' briefs. *See* Brief for Defendants-Appellees at 56, *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Nos. 02-7330, 02-7325); Brief of the World Health Organization As *Amicus Curiae* In Support of the Position of the European Community and the Member States and Reversal of the Judgment of the District Court at 10-11, *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Nos. 02-7330, 02-7325). For the reasons noted above, the Second Circuit properly rejected petitioners' interpretation of the FCTC, and remand on this issue is wholly unnecessary.

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12. *See* WHO Framework Convention on Tobacco Control ("FCTC"), May 21, 2003, arts. 15 & 19, *at* http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf (last visited June 14, 2004).

B. Petitioners' Remaining Criticisms Of The Second Circuit's Decision Provide No Basis For The Court's Review

Petitioners' remaining criticisms of the Second Circuit's opinion also do not survive scrutiny.

First, petitioners claim that the Second Circuit erred on whether the Revenue Rule is a jurisdictional or discretionary doctrine. Pet. at 23-24. Petitioners misstate the Second Circuit's ruling. The Second Circuit did not hold that "the revenue rule is a mandatory doctrine that divests the courts of the power and discretion to enjoin or remedy a smuggling scheme." Pet. at 24. In fact, the court held the opposite, recognizing that "the revenue rule is . . . not absolute." App. 27a n.7. The court explained that "the revenue rule will not be triggered where the sovereignty and extraterritoriality concerns that inform the rule's application are not present." App. 27a n.7. But, "once the sovereignty and separation of powers concerns that inform the rule are implicated by the substance of a plaintiff's claims, the court may not hear those claims absent evidence that the rule has been abrogated." App. 28a.

Second, petitioners claim that the decision below ignored foreign governments' general "access to [American] courts." Pet. at 18-19. The Second Circuit in fact expressly acknowledged that "foreign sovereigns have long had access to United States courts, and may sue for violation of domestic laws." App. 24a n.7. However, the Revenue Rule represents a well-established exception. *See generally* William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161 (2002). It is for this reason that the courts have looked to tax treaties, rather than treaties providing general access

to courts, to determine the continued viability of the Rule. *See* App. 24a n.7 (noting that treaties cited by petitioners "are not particularly relevant").

In any event, petitioners' alleged desire to permit "U.S. allies" (Pet. at 18) access to our courts to vindicate foreign revenue laws only underscores the need to leave such decisions to the political branches. To allow courts to decide which foreign government is an "ally" and which is not (or which foreign revenue laws deserve enforcement and which do not) would interject the judiciary into ongoing treaty negotiations and sensitive diplomatic issues better left to the political branches.[13]

Finally, petitioners claim that the Second Circuit itself violated separation of powers principles by suggesting that whether or not the judiciary will apply the Revenue Rule depends on whether the Executive Branch has "express[ed] its 'consent or approval.'" Pet. at 25 (citation omitted). Petitioners argue that this suggestion conflicts with various

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13. Relying on a Third Circuit decision from 1810, petitioners suggest that the Revenue Rule does not apply to common law claims. Pet. at 16-17 (citing *King of Spain v. Oliver*, 14 F. Cas. 571 (C.C.D. Pa. 1816) (No. 7,812). As this Court explained, however, *King of Spain* "was not founded upon [foreign tax] laws, or brought against a person who had broken them," but was a breach of contract action. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888), *overruled on other grounds by Milwaukee County*, 296 U.S. 268. *King of Spain* stands for nothing more than the general rule that "foreign States may sue private parties in the federal courts." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 n.2 (1934) (citing *King of Spain*, 14 F. Cas. 571). Courts have not hesitated to apply the Revenue Rule to state common law claims when the Rule was otherwise applicable. *See Republic of Honduras*, 341 F.3d 1253.

opinions in *First National City Bank v. Banco National de Cuba*, 406 U.S. 759 (1972). As an initial matter, as the petition itself makes clear, there is no holding in *First National City Bank* that a federal court may never consider the position of the Executive Branch in deciding how to proceed in a case that presents foreign policy issues. Indeed, U.S. courts often solicit the views of the Executive Branch on matters touching on foreign affairs. Nor did the Second Circuit hold, as petitioners suggest, how the political branches must express consent before a U.S. court may resolve a claim touching on foreign tax matters. Such an issue simply was not presented by this case, where neither Congress nor the Executive Branch has communicated *in any way* its support for this suit. To the contrary, the Executive Branch has done nothing to indicate any change of position from the one expressed to the Court in *Canada*, *i.e.*, that claims of this nature are and should be barred by the Revenue Rule. Accordingly, petitioners' reliance on *First National City Bank* provides no basis for the Court's review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The tobacco companies' opposition brief contains several variations on a single theme: U.S. courts are powerless to *enjoin* U.S.-based smuggling schemes that contravene *U.S. domestic common law*.

This extraordinary position is predicated on the judge-made revenue rule, which this Court is expected to construe in *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (*en banc*), *cert. granted*, 124 S. Ct. 1875 (2004) (No. 03-725). In light of *Pasquantino* and intervening treaty action by the U.S., this Court should hold the petition and, thereafter, grant the petition, vacate the judgment, and remand the case ("GVR"). Alternatively, for all of the reasons previously set forth (Pet. at 11-26), this Court should grant the petition and accord the case plenary review.

I. This Court Should Hold The Petition In Light Of *Pasquantino*

The linchpin of the tobacco companies' position is the common law revenue rule, which is directly at issue in *Pasquantino*. The revenue rule is also the main focus of the instant petition, and is the subject of several conflicts between the opinion below and the decisions of this Court and other Courts of Appeals. *See* Pet. at 11-13 (conflict concerning definition of revenue rule); 11-13 (conflict concerning the applicability of the revenue rule to claims for injunctive relief), 16-17 (conflict concerning whether the revenue rule applies to cases under U.S. domestic law); 20-23 (conflict concerning the federal Judiciary's equitable power to enjoin harmful conduct); 23-25 (conflict concerning whether the revenue rule is permissive or mandatory).

This Court should hold the petition because *Pasquantino* will likely resolve several direct conflicts between the Fourth and Second Circuits. For example, in *Pasquantino*, *both* the majority and dissenting opinions determined that the revenue rule is "permissive," *Pasquantino*, 336 F.3d at 329, and "discretionary," *ibid.*, 336 F.3d at 340 (Gregory, J., dissenting). In contrast, the Second Circuit rejected the view that the rule was "discretionary" (App. 27a), and treated the rule as a mandatory bar under which the courts "may not" entertain a claim to enjoin a smuggling scheme. App. 28a; Pet. at 23-25.[1] In addition, *Pasquantino* recognized that the revenue rule is limited to cases seeking enforcement of foreign tax judgments (336 F.3d at 329 & n.3); in contrast, the court below incorrectly extended the revenue rule to bar claims under *U.S. domestic common law* that seek to *enjoin* U.S.-based conduct and do not seek recovery of lost foreign taxes. App. 27a; Pet. at 11-13. *Pasquantino* will likely resolve such conflicts; this Court should therefore hold the petition and accord the case GVR treatment.

---

1. Respondents assert that the Second Circuit did not hold that the revenue rule was mandatory and there is no conflict. Br. in Opp. 21. In fact, as respondents acknowledge (*ibid.*), the court below held that federal courts "may not" hear smuggling claims. Similarly, the Second Circuit held that, under the revenue rule, "we have no choice" but to bar Canada's claims for "lost tax revenues and tax enforcement costs as RICO damages." *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103, 106 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002) ("*Canada*"). The Second Circuit's view also conflicts with *Milwaukee County v. M.E. White Company*, 296 U.S. 268, 272 (1935) (revenue rule is not jurisdictional; "comity" allows a court to entertain a foreign tax claim).

II. Respondents' Effort To Distinguish *Pasquantino* Is Unavailing

Respondents argue that the revenue rule is inapplicable in federal criminal cases to combat smuggling (*Pasquantino*), but is a categorical bar to common law claims seeking to enjoin the same conduct. Br. in Opp. 2, 14-16. This civil-criminal dichotomy is inapplicable and constitutionally flawed.

A. The Revenue Rule And The Civil-Criminal Dichotomy Are Inapplicable To Claims For Injunctive Relief Under U.S. Domestic Common Law

The revenue rule and the civil-criminal distinction adopted by the Second Circuit in applying it do not govern the common law claims for injunctive relief before this Court. Pet. at 11-13, 20-25. Petitioners seek injunctive relief under U.S. domestic common law to enjoin U.S.-based conduct that contravenes basic standards of care. The claims do not aim to collect foreign taxes or enforce foreign tax law, as respondents repeatedly assert. *See* Br. in Opp. i, 1, 9-10. The claims for injunctive relief do not seek money damages. The factual predicate for application of the revenue rule and its interpretive rules — a claim to collect foreign taxes — thus is not presented.

Without reference to any judge-made impediment such as the revenue rule or the civil-criminal distinction, the United States has sought equitable relief through direct civil litigation in foreign courts under *United States* law, even when that case relates to taxes. *See* Pet. at 14-15, citing, *inter alia*, *U.S. Securities and Exchange Commission v. Shull*, [1999] CarswellBC 1772 (B.C.S.C. [In Chambers]) (Can.).

Since the United States has obtained such equitable relief in foreign courts, it follows, *a fortiori*, that foreign States should be able to seek *injunctive* relief in U.S. courts under *U.S. law* in cases that do not seek to recover taxes.[2]

Consistent with this approach, the Fourth Circuit emphasized the "critical point" that a smuggling prosecution under U.S. domestic law vindicated *U.S. interests* in preventing wire fraud, and did not enforce foreign revenue laws or collect foreign taxes. *Pasquantino*, 336 F.3d at 331. The revenue rule does not apply when a civil claim is predicated on "state common law." *Canada*, 268 F.3d at 136 n.3 (Calabresi, J., dissenting). "[W]hen American law renders an activity — including the violations of foreign tax laws — an American tort or crime" there is no basis to apply the revenue rule. *Ibid.* at 137. Allowing a civil case to proceed under U.S. domestic law "advances *our own* interests." *Ibid.* at 136 (emphasis in original). Similarly, the common law claims for injunctive relief in this case do not seek to collect foreign taxes or enforce foreign tax law. Most importantly, the claims directly vindicate the substantial U.S. interest in eradicating U.S.-based conduct that facilitates organized crime and terrorism.

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2. It is disingenuous for respondents to argue that, in *Canada*, the "United States expressly agreed that claims for injunctive relief, like those presented here, are barred by the Revenue Rule." Br. in Opp. 12 (citing U.S. *Amicus* Brief at 14 n.1). First, the Second Circuit in *Canada* addressed only claims for "lost tax revenues and tax enforcement costs as RICO damages." *See Canada*, 268 F.3d at 106. Second, the Solicitor General's *amicus* brief in *Canada* was restricted to the specific claims for damages at issue, namely claims for "lost tax revenue and associated law enforcement costs." U.S. *Amicus* Br. at I. Indeed, the Solicitor General confirmed that because "claims for . . . equitable relief" might "be distinguished, for purposes of the revenue rule, from petitioner's claim for lost revenue," the equitable claims are "*not presented here*." *Amicus* Br. at 15 n.1 (emphasis added).

Consistent with the policy goals of U.S. domestic law, the dissent in *Canada* forcefully rejected the "civil-criminal distinction" on two bases: (1) "the Supreme Court's consistent refusal to treat criminal and civil RICO actions differently," and (2) "there is no basis in the revenue rule itself for treating criminal and civil cases differently." *Canada*, 268 F.3d at 139 (Calabresi, J., dissenting). This rationale is persuasive and it demonstrates that there is no basis for the civil-criminal distinction.

B. The Civil-Criminal Distinction Is Constitutionally Flawed

The Second Circuit's civil-criminal distinction is rooted in an inaccurate reading of *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). The Second Circuit stated that it was this Court's "*holding*" in *First National City Bank* that "courts have allowed litigation to proceed when the executive branch expressed its consent to adjudication by the courts," *Canada*, 268 F.3d at 123 n.25 (emphasis added), such as where the Executive Branch "institutes a prosecution." App. 14a. In fact, the majority in *First National City Bank* reached the *opposite* conclusion, holding that federal courts need not obtain the permission of the Executive Branch to exercise their core powers. *See* Pet. at 25-26.

This misinterpretation gives rise to serious separation-of-powers concerns. Respondents contend that a court may only adjudicate a smuggling case with the "imprimatur" and "consent" of the Executive Branch. Br. in Opp. 14, 15. In fact, a federal court has never needed "the Executive's permission before invoking its jurisdiction" and to hold otherwise would raise serious separation-of-powers issues.

First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (Powell, J., concurring). *Accord Hamdi v. Rumsfeld*, No. 03-6696 (June 28, 2004), slip op. 29-30 (plurality opinion) (the position that the Judicial Branch "must forgo" entertaining a case simply because that is the outcome favored by the Executive "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government") (emphasis in original).

Similarly, the Fourth Circuit recognized that a "significant separation of powers problem" would arise if the Court were to "play diplomat from the bench by relying on a novel expansion of the common law revenue rule." *Pasquantino*, 336 F.3d at 331. Not only did the Second Circuit expand the revenue rule to bar claims under U.S. statutory law in *Canada*, and to bar claims for common law injunctive relief in the court below (App. 27a), it also justified that *novel expansion* by its new civil-criminal distinction. App. 14a. This policymaking raises separation-of-powers concerns because it subjects the judicial relief available in U.S. courts to the discretionary approval or permission of Executive Branch personnel.

The civil-criminal distinction also raises federalism concerns. The Second Circuit's approach effectively deprives State and local officials — who are not officers of the Executive Branch — of the power to combat smuggling under State law absent the consent of Executive Branch personnel. If adopted by this Court, the civil-criminal distinction would impermissibly restrict the primary, independent role of the States in law enforcement. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

In sum, this Court should not embrace the constitutionally flawed civil-criminal distinction, and should dispose of the case "on another ground," *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569 n.33 (1947), namely that the revenue rule is inapplicable to actions predicated on U.S. domestic law that do not directly seek to collect foreign taxes.

III. GVR Treatment Is Appropriate Due To An Intervening Event: U.S. Treaty Action Expressly Confirming The Executive Branch's Strong Policy Favoring Broad Cooperation With Foreign States In Cigarette Smuggling Cases

This Court has accorded GVR treatment to cases where there have been "'intervening developments'" that "'reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may undermine the ultimate outcome of the litigation,'" *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (citation omitted).

On May 11, 2004, the United States signed the Framework Convention on Tobacco Control, WHA56.1 (May 21, 2003) ("FCTC"), and thereby expressly confirmed that it is United States policy to extend broad cooperation to foreign States in cigarette smuggling cases initiated by foreign States. *See* Supp. Br. for Petitioners.

The FCTC expressly embraces the policy that "cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including

smuggling." FCTC, Preamble. To this end, the FCTC contains strong and unequivocal provisions, proposed and advocated by the United States, which require that all parties "shall" act to "promote cooperation" on an "international" and "intergovernmental" basis in "proceedings" brought to eliminate "illicit trade in tobacco products." FCTC, art. 15(6). The United States has publicly confirmed that "the treaty contains a strong U.S.-drafted provision against tobacco smuggling" which is designed to "prevent illicit trade in tobacco." HHS Press Release, May 11, 2004 (App. to Supp. Br. for Petitioners).

The FCTC negates the Second Circuit's overarching conclusion — and respondents' main argument before this Court (Br. in Opp. 1-2, 5-6, 12-13, 17-19) — that the United States "strictly limits" cooperation with foreign States in cigarette smuggling cases. *Canada*, 268 F.3d at 119; App. 14a. The Second Circuit had the "perception" that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a, 25a. The FCTC, however, confirms that U.S. policy favors extending broad cooperation to foreign States in proceedings to combat cigarette smuggling. Accordingly, reconsideration of the Second Circuit's opinion in light of the FCTC may undermine the ultimate outcome of the litigation.

Hoping to sidestep the FCTC, respondents misrepresent the Convention's *text*. They left aside the governing text of Article 15(6), which requires "cooperation" on an "international" and "intergovernmental" basis in cigarette smuggling "proceedings." Instead, they incorrectly assert that the FCTC "only provides for information exchange among government agencies." Br. in Opp. 20. That subject appears in the FCTC, but is covered by a different provision: Article

15(5). The text of Article 15(6) is controlling here and the tobacco companies' *post hoc* effort to rewrite the FCTC to limit its scope is unavailing.[3]

Respondents incorrectly assert that the FCTC has no legal significance. Br. in Opp. 20. As a signatory, the United States, including its judiciary, is "obliged to refrain from acts which would defeat the object and purpose" of the FCTC. United Nations Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. (1971), art. 18(a) (signed for the United States on April 24, 1970). Refusing cooperation in this case based on the revenue rule defeats a key object and purpose of the FCTC and undermines a public policy promoted by the United States Government.[4]

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3. Respondents purport to recount the drafting history of the FCTC, asserting that the "U.S. delegation objected to a draft provision that would have imposed extraterritorial liability for duties and taxes." Br. in Opp. 19. This point is irrelevant to the issue of equitable relief before this Court. Moreover, respondents' "evidence" cannot override the final text of the FCTC, is indecipherable in any event, and should be considered, if at all, by the Court of Appeals on remand.

4. Respondents also err in arguing that Second Circuit "rejected Petitioners' interpretation" of the FCTC. Br. in Opp. 20. The Second Circuit's decision did not "reject" or even mention the FCTC. The Second Circuit's decision was rendered on January 14, 2004, well before the FCTC was signed by the United States. Moreover, as the World Health Organization explained, the FCTC "is not intended to and will not supplant rights that accrue to persons, including governments, under U.S. domestic law and foreign law." WHO *Amicus* Br. at 11.

CONCLUSION

The petition should be accorded GVR treatment. Alternatively, the petition should be granted and accorded plenary consideration. The case is of profound international importance. The Courts of Appeals are in clear conflict about the scope of the revenue rule. This Court should exercise its supervisory power to provide authoritative guidance in this crucially important area.

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IN THE

Supreme Court of the United States

THE EUROPEAN COMMUNITY, *et al.*,

Petitioners,

v.

RJR NABISCO, INC., *et al.*,

Respondents.

DEPARTMENTS OF THE REPUBLIC OF COLOMBIA,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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PRELIMINARY STATEMENT

Counsel "have a continuing duty to inform the Court of any development which may conceivably affect an outcome." *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring); *see also Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*).

On May 11, 2004, the United States signed the Framework Convention on Tobacco Control, WHA56.1 (May 21, 2003) ("FCTC"), and thereby expressly confirmed its strong policy favoring cooperation with foreign States in proceedings brought to combat cigarette smuggling. This is a relevant and important development, that occurred after the filing of the instant petition, that Petitioners believe should be brought to the Court's attention under the authorities cited above.

THE EXECUTIVE BRANCH HAS EXPRESSLY CONFIRMED ITS STRONG POLICY FAVORING COOPERATION WITH FOREIGN STATES IN CIGARETTE SMUGGLING CASES

The Court of Appeals' decision was predicated on the "perception" that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a, 25a. The recent action of the Executive Branch renders this perception incorrect.

On May 11, 2004, the United States signed the FCTC, the first-ever global public health treaty. The FCTC embraces the policy that "cooperative action is necessary to eliminate all forms of illicit trade in cigarettes and other tobacco products, including smuggling." FCTC, Preamble. To this

end, the FCTC contains strong and unequivocal provisions, promoted by the United States, which require that all parties "shall" act to "promote cooperation" on an "international" and "intergovernmental" basis in "proceedings" brought to eliminate "illicit trade in tobacco products." FCTC, art. 15(6).[1] The United States has publicly confirmed that "the treaty contains a strong U.S.-drafted provision against tobacco smuggling" which is designed to "prevent illicit trade in tobacco." Department of Health & Human Services ("HHS") Press Release, May 11, 2004.[2]

The FCTC is an authoritative expression of Executive Branch policy that should be credited by the courts. It provides compelling new evidence — unavailable to the Court of Appeals — that the Executive Branch expressly favors broad "cooperation" with foreign States in connection with "proceedings" initiated by foreign States to eliminate cigarette smuggling. Had this express policy pronouncement been available to the Court of Appeals, in addition to the evidence already submitted by Petitioners, it should have altered the Court of Appeals' perception that there was no "evidence" that the Executive Branch favors "assistance" to foreign States in cigarette smuggling cases. App. 14a.

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1. Other provisions of the FCTC also underscore the overarching policy of cross-border cooperation and comity in the general area of tobacco control. *See, e.g.*, FCTC, art. 19(3) (calling for reciprocal "assistance in legal proceedings relating to civil and criminal liability consistent with this Convention"); art. 19(4) (preserving the reciprocal right of access to the courts).

2. The HHS press release is a public document of which this Court may take judicial notice. It is publicly available at the official HHS website —(*http://www.hhs.gov/news/press/2004pres/20040511.html*) and, for the sake of convenience, is reproduced hereto as an appendix.

Application of the judge-made revenue rule to bar Petitioners' lawsuit would directly and unjustifiably defeat the object and purpose of the FCTC. As a signatory, the United States "is obliged to refrain from acts which would defeat the object and purpose" of the FCTC. United Nations Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. (1971), art. 18(a) (signed for the United States on April 24, 1970) ("Vienna Convention").[3] The object and purpose of Article 15 of the FCTC is to promote, foster and enhance reciprocal cooperation in connection with proceedings brought by foreign States to combat cigarette smuggling. The barring of such assistance on the basis of the revenue rule would be inconsistent with this policy and would undermine a key provision of the FCTC promoted by the United States Government.

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3. The U.S. Department of State recognizes the Vienna Convention as "the authoritative guide to current treaty law and practice." *See, e.g.*, Vienna Convention on the Law of Treaties, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971); *accord Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), *cert. denied*, 534 U.S. 891 (2001) ("the United States 'recognizes the Vienna Convention as a codification of customary international law'") (citation omitted). The United States has recently reaffirmed this view. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Republic of Austria v. Altman*, at 17 n.11 (No. 03-13) (Nov. 2003).

CONCLUSION

In light of the FCTC, the instant petition should be granted, the judgment below should be vacated, and the case should be remanded to allow the Court of Appeals, in the first instance, to revisit its judgment that there is no evidence that the Executive Branch favors assistance to foreign States in cigarette smuggling cases.

Alternatively, the petition should be granted, and the case should be accorded plenary treatment.

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APPENDIX

APPENDIX — NEWS RELEASE

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES

NEWS RELEASE

FOR IMMEDIATE RELEASE
Tuesday, May 11, 2004

Contact: HHS Press Office
(202) 690-6343

United States Signs Tobacco Control Treaty

NEW YORK — On behalf of the United States, HHS Secretary Tommy G. Thompson signed the Framework Convention on Tobacco Control (FCTC) on Monday at the United Nations. The FCTC is the first-ever global public health treaty negotiated under the auspices of the World Health Organization (WHO).

The treaty serves as an important basis for advancing public health worldwide. It encourages other nations to establish standards similar to the ones set for tobacco prevention and control domestically in the United States. For example, the treaty contains a strong U.S.-drafted provision against tobacco smuggling, which could help prevent illicit trade in tobacco.

"The United States has long been a world leader in anti-smoking efforts," Secretary Thompson said. "We have committed more resources than any other country to the research, development and evaluation of smoking control and

cessation programs, both at home and abroad. President Bush and I look forward to working with the WHO and other member nations to implement this agreement."

Secretary Thompson noted that the United States is making strides in reducing death and disease caused by tobacco as well as in diminishing use, especially among children. Youth smoking rates have dropped significantly in this country among minors — from 18.9 percent in the mid-1990s to 13 percent in 2002. However, tobacco-related illness remains the leading preventable cause of death among adult Americans.

The United States, with HHS as the lead agency, participated actively throughout the drafting process and negotiations to help achieve a strong and effective instrument for global tobacco control. The World Health Assembly adopted the FCTC in May 2003. The United States becomes the 108th nation to sign this treaty.

The FCTC is intended to provide for basic tobacco control measures to be implemented by all parties through domestic law. The objective of the FCTC is to protect "present and future generations from devastating health, social, environmental and economic consequences" of tobacco use and to reduce the prevalence of tobacco use and exposure to tobacco smoke.

The demand for and the supply of tobacco is addressed through various means, including smoking prevention and cessation, health warnings on packaging, restrictions on tobacco advertising and sponsorship in accordance with each

signatory nation's domestic law and constitution, and measures to combat illicit trade. Promoting public awareness of the adverse health effects of tobacco use is also a key element of the treaty. Parties must support measures to protect against exposure to tobacco smoke in public venues, and prohibit cigarette sales to minors.

The FCTC is designed to reduce the demand for and the supply of tobacco, and promoting public awareness of the adverse health effects of tobacco use is a key element of the treaty. Once the FCTC takes effect, treaty requires partners to:

- Promote public awareness of tobacco control and promote smoking prevention and cessation.

- Include health warnings on packaging and ensure that tobacco product packaging and labeling is not false or misleading, or could create the false impression that the product is less harmful than other tobacco products.

- Have restrictions on tobacco advertising and sponsorship in accordance with each nation's domestic law and constitution.

- Have measures to combat illicit trade to prevent tobacco smuggling, a provision drafted by the United States.

- Prohibit tobacco product sales to minors.

Appendix

The treaty is open for signature until June 29. The treaty will take effect after 40 nations have ratified it; nine nations have ratified the FCTC so far. The next step for the treaty in the United States is submission to the Senate, following completion of further interagency review of the treaty.

* * *

Note: All HHS press releases, fact sheets and other press materials are available at *http://www.hhs.gov/news.*

Last Revised: May 11, 2004

U.S. Department of Health & Human Services • 200 Independence Avenue, S.W. • Washington, D.C. 20201

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PRELIMINARY STATEMENT

Petitioners requested that this case "be held pending this Court's disposition of *United States v. Pasquantino*, No. 03-725, and upon the disposition of that case, the Court should grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration" Pet. at 27; *accord id.* at 8-11.

On April 26, 2005, the Court issued *Pasquantino*. *See Pasquantino v. United States*, 544 U.S. __ (2005). It is abundantly clear that the decision provides no reason for a GVR in this case and that this Court should now deny the petition outright. This Court in *Pasquantino* specifically stated that it "express[es] no view" on the precise question presented by this case: "whether a foreign government .. . may bring a civil action under [RICO] for a scheme to defraud it of taxes." *Pasquantino*, slip op. at 3 n.1. Nothing in *Pasquantino*, therefore, is contrary to the Second Circuit's decision below. Indeed, the opposite is true: the reasoning of *Pasquantino* is consistent with that of the Second Circuit, which expressly held that the Revenue Rule does not apply to criminal prosecutions like the one in *Pasquantino*, but does apply to civil lawsuits brought by foreign sovereigns. *See* App. 14a. The Second Circuit's holding is also consistent with the position of the United States, which in *Pasquantino* relied on the distinction between civil and criminal cases and agreed that the Revenue Rule bars civil RICO cases such as those here. *See* Brief for the United States at 15 n.4, *Pasquantino* (No. 03-725). A GVR would do nothing more than waste judicial resources and further delay this case unnecessarily.

PASQUANTINO HAS NO BEARING ON THIS CASE AND THE COURT SHOULD DENY THE PETITION AND NOT GVR

A GVR may be appropriate where "[1] recent developments that we have reason to believe the court below did not fully consider, [2] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where ... redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *accord Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). Given this Court's decision in *Pasquantino*, these criteria are not met here.

First, this Court's decision in *Pasquantino* presents no holding or legal analysis that qualifies as a "recent development" that the Second Circuit failed to consider below. As an initial matter, this Court was unequivocal in stating that it expressed "no view" on the application of the Revenue Rule in cases such as this – i.e., civil actions brought by foreign sovereigns to vindicate foreign revenue laws. *Pasquantino*, slip op. at 3 n.1. Therefore, this Court should not GVR this case because this Court simply did not address the question at issue here in *Pasquantino*.

Beyond that, the reasoning of this Court's *Pasquantino* decision is fully consistent with the application of the Revenue Rule in this case. In *Pasquantino*, this Court recognized that the unique characteristics of criminal cases, not present in civil cases, rendered the Revenue Rule inapplicable. The Second Circuit's interpretation of the Revenue Rule is completely in accord with this Court's holding. *See Pasquantino*, slip op. at 3 (noting that the Court was resolving split between the Second Circuit's decision in

Trapilo and the First Circuit's decision in *Boots*). As the Second Circuit explained, these unique characteristics prevent application of the Revenue Rule to criminal prosecutions, but have no application where, as here, a foreign sovereign brings a civil action to vindicate foreign revenue laws. App. 13a-14a.

For instance, this Court recognized that the Revenue Rule traditionally has not been interpreted as barring domestic criminal prosecutions, but rather, "prohibit[ed] the enforcement of tax liabilities of one sovereign in the courts of another sovereign. . . ." *Pasquantino*, slip op. at 10; *see also id.* at 13 ("The main object of the action in each of those cases was the collection of money that would pay foreign tax claims."). Thus, the Court's decision confirms the Revenue Rule's traditional application and is consistent with its application generally to civil cases like this one, where foreign sovereigns are seeking to vindicate their foreign revenue laws.

Further, this Court recognized that a criminal prosecution "poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns." *Id.* at 17. Criminal prosecutions do not pose such a risk because of the presence of the Executive Branch:

> But we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any.

Id. at 18. The Second Circuit already considered this precise issue and recognized that, in a civil suit brought by a foreign sovereign, this "safeguard" does not exist. The Second Circuit thus concluded that in such a civil context the Revenue Rule serves essential separation of powers concerns:

> [C]laims by foreign sovereigns invoking their tax statutes may embroil the courts in an evaluation of the foreign nation's social policies, an inquiry that can be embarrassing to that nation and damaging to the forum state. Moreover, because the conduct of foreign relations is primarily the realm of the legislative and executive branches, judicial examination and enforcement of foreign tax laws at the behest of foreign nations may conflict with the other branches' policy choices. . . .

App. 13a (internal citations omitted). Indeed, in *Pasquantino* the United States also emphasized the crucial distinction between civil and criminal cases and took the position that the Revenue Rule bars civil RICO cases such as those here. *See* Brief for the United States at 15 n.4, *Pasquantino* (No. 03-725).

In short, there is no reason to GVR this case so that the Second Circuit can consider the distinctions between criminal and civil cases anew. The Second Circuit has already fully considered them in the decision below.

Second, there is no "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167. As noted, this Court interpreted the Revenue Rule in the same way that the Second Circuit interpreted it below. Nothing in *Pasquantino*

provides even a remote possibility – much less a "reasonable probability" – that the Second Circuit would reject its prior decision.

Finally, where "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. That is exactly the case here. Remanding this case for application under *Pasquantino* would simply require the Second Circuit to reconfirm its prior holding. A GVR here, therefore, would result only in delay and further cost. *See id.* at 174 ("Respect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket all counsel against undisciplined GVR'ing.").

CONCLUSION

The petition for a writ of certiorari should be denied.

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Preliminary Statement

As previously requested, this Court should grant the Petition, vacate the judgment below, and remand to the Second Circuit (GVR) for further consideration in light of this Court's decision in *Pasquantino v. United States*, No. 03-725 (April 26, 2005). Petitioners respectfully direct the Court's attention to their arguments requesting GVR treatment in prior submissions. Petition at 8, 10-11; Supplemental Brief for Petitioners at 1-4; Reply Brief at 1-2, 7-9.

GVR is entirely appropriate here. The Second Circuit affirmed the dismissal of the Petitioners' claims on the basis of unsettled law concerning the revenue rule, and now that the law on this point is settled, the Second Circuit should be permitted the opportunity to revisit its decision. This is particularly true given that this Court specifically repudiated the treaty-based analysis of the Second Circuit that led to the dismissal of Petitioners' claims in this case.

Perhaps most importantly, *Pasquantino* made it clear that use of *domestic* law to combat fraud in the United States vindicates substantial domestic interests, and is not barred by the revenue rule. The aim of the Petitioners' specific common law claims before this Court — to enjoin and eradicate organized crime that harms domestic interests and violates domestic law — has nothing to do with tax collection and is not barred by the revenue rule. GVR treatment is appropriate to allow the Court of Appeals to address these considerations, or alternatively, the Petition should be granted and the case set down for plenary consideration.

The Second Circuit Ruled On the Scope of the Revenue Rule Without The Benefit of *Pasquantino*

On January 14, 2004, the Second Circuit ruled against the interests of the European Community, its Member States, and the Departments of the Republic of Colombia, without the benefit of this Court's guidance in *Pasquantino*. App. 1a-30a. This Court has held the Petition pending the outcome of *Pasquantino*, and the case now should be remanded to the Second Circuit for consideration of *Pasquantino*.

Prior to *Pasquantino*, the scope of the revenue rule was highly uncertain. In *Attorney General of Canada v. R.J. Reynolds Tobacco Co.*, 268 F.3d 103 (2d Cir. 2001) — which provided the

basis for the decision below (App. 4a-5a, 12a-18a) — the Second Circuit stated that "the United States Supreme Court [has] not ruled on the precise scope of the rule." *Id.* at 109. Indeed, the scope of the revenue rule has always been uncertain. As Justice Thomas observed: "[t]he line the revenue rule draws between impermissible and permissible 'enforcement' of foreign revenue law has . . . always been unclear." *Pasquantino*, slip op. at 16. *Pasquantino* has clarified the law in this important area.

GVR treatment is appropriate in this case. *Pasquantino* is an intervening event providing an authoritative ruling on the scope of the revenue rule. *Pasquantino* laid out the analytical framework for addressing the potential application of the revenue rule to a particular claim. *Pasquantino* provided much needed clarification and guidance for the courts. On this basis alone, the case should be remanded and the Second Circuit should be allowed to reconsider its ruling below in light of *Pasquantino*. Indeed, this is the classic situation favoring GVR treatment. *See, e.g., Stutson v. United States*, 516 U.S. 163, 180-181 (1996).

Pasquantino Addressed and Rejected The Second Circuit's Approach

GVR treatment is appropriate because *Pasquantino* directly undermined the decision below.

The Second Circuit barred Petitioners' common law claims seeking to *enjoin* cross-border smuggling schemes, carried out by these defendants on United States soil. In reaching this conclusion, the Second Circuit's pivotal rationale was that, by means of the United States tax treaties, the United States has "clearly expressed [the] intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Attorney General of Canada*, 268 F.3d at 119; App. 14a. Because the tax treaties did not specifically provide for access to the courts on smuggling claims, the Petitioners were denied access to the courts, under the Second Circuit's approach.

Pasquantino squarely rejects this approach. This Court specifically addressed and rejected the treaty-based rationale of *Attorney General of Canada* and held that: "U.S. tax treaties" do

not limit the reach of domestic law, such as the wire fraud statute. *Pasquantino*, slip op. at 7 (citing *Attorney General of Canada*).

The Second Circuit's treaty-based rationale was also considered by the dissent. Part I of Justice Ginsburg's dissent (joined by Justice Breyer), specifically embraced the Second Circuit's rationale, stating: "Congress has actively indicated, through both domestic legislation and treaties, that it intends 'strictly to limit the parameters of any assistance given' to foreign nations." *Pasquantino*, slip op. at 8 (Ginsburg, J., dissenting) (quoting *Attorney General of Canada*). The majority, however, specifically rejected this view. *Pasquantino*, slip op. at 7 (citing *Attorney General of Canada*).

The Second Circuit's treaty-based rationale that led to the dismissal of Petitioners' claims was considered, debated and rejected by this Court, and remand is appropriate to allow the Second Circuit to address the implications of *Pasquantino*.

The Revenue Rule Does Not Bar The Claims Before This Court

The Second Circuit's application of the revenue rule to bar the common law, equitable claims before this Court is irreconcilable with *Pasquantino*, and GVR treatment is therefore appropriate.

Pasquantino narrowed the revenue rule, as it had been reformulated and extended by the Second Circuit. The revenue rule, at its core, applies to claims seeking "the collection of tax obligations of foreign nations." *Pasquantino*, slip op. at 10. *See also Pasquantino*, slip op. at 10 ("collection of foreign tax claims"); 10 (enforcement of a "'tax judgment'") (citation omitted); 11 ("a suit that recovers a foreign tax liability, like a suit to enforce a judgment"). The revenue rule applies where "'the whole object of the suit is to collect tax for a foreign revenue.'" *Id.* at 13 (citation omitted). The revenue rule does not apply to an action, predicated on *domestic* law (like the wire fraud statute), that addresses *domestic* conduct, in order to vindicate a substantial *domestic* interest in combating fraud, separate and apart from foreign tax matters. *Pasquantino*, slip op. at 11, 13. This Court held that "the revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, slip op. at 15.

Under *Pasquantino*, the Second Circuit's decision to bar the common law claims for equitable relief before this Court cannot

stand. The Question Presented in the Petition is:

> Whether the Court of Appeals erred in extending the "revenue rule" to bar claims brought under U.S. domestic law seeking equitable relief to enjoin and remedy smuggling schemes based in the United States.

Petition at i.

The Petition is limited to very specific common law claims for equitable relief under domestic law, and does not raise other claims. Petitioners assert common law tort claims, such as negligence, fraud, unjust enrichment and public nuisance, all of which seek *injunctive* relief to abate the damaging conduct that violates domestic law. The claim for an injunction is predicated on U.S. domestic common law, not foreign tax law. This claim seeks to *enjoin* domestic wrongdoing, not recover foreign taxes. This claim vindicates substantial domestic interests in enjoining wrongdoing that fuels organized crime – interests that are independent of foreign tax collection. It absolutely cannot be said that this claim seeks, in whole or in part, the recovery of foreign taxes. In fact, it seeks injunctive relief, not money. The revenue rule, as articulated by this Court in *Pasquantino*, does not bar such claims, and the Second Circuit should be permitted the opportunity to reassess its decision to bar Petitioners' claims in light of *Pasquantino*.

The Petitioners' claim for injunctive relief does not constitute a direct or indirect effort to collect foreign taxes or enforce foreign tax law. This Court has made it plain, consistent with the Irish court in *Buchanan*, that the revenue rule bars a claim in which the "'whole object of the suit is to collect tax for a foreign revenue.'" *Pasquantino*, slip op. at 13 (citation omitted). Petitioners' claim for an injunction under domestic law obviously is not such a suit. "[T]he revenue rule never proscribed all enforcement of foreign revenue law." *Pasquantino*, slip op. at 15. Even if Petitioners' injunction claim were thought to "enforce" foreign revenue law in some "attenuated" or indirect sense, it would be permissible under *Pasquantino*. *Pasquantino*, slip op. at 15 ("attenuated" enforcement of Canadian tax law does not "contravene the revenue rule"). It should be left to the Court of Appeals to decide, on the basis of *Pasquantino* and an appropriate record, whether the

Petitioners' claims still fall within the purview of the revenue rule.

In their Supplemental Brief, the Respondents misrepresent the specific claim before this Court on this Petition in an effort to prevent GVR treatment. This Court stated: "[w]e express no view on the related question whether a foreign government, based on wire fraud or mail fraud predicate offenses, may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act for a scheme to defraud it of taxes." *Pasquantino*, slip op. at 3 n.1 (citations omitted). Respondents are incorrect when they assert that the issue identified in the Court's footnote is the "precise question presented by this case." Respondents' Supp. Br. at 1. Respondents simply ignore the Question Presented in the Petition. This Court should not accept Respondents' invitation to casually aggregate all of Petitioners' claims, re-characterize them as RICO claims for lost taxes, and summarily bar the claims under the revenue rule.

Petitioners' main focus on the Petition is whether the revenue rule bars a claim under United States *common* law, to *enjoin* fraudulent conduct within the United States. The Court's footnote does not render *Pasquantino* inapplicable to this case.

Finally, the Respondents claim that a civil action brought by a foreign government lacks "safeguards" to prevent international friction. Respondents' Supplemental Brief at 3-4. This is plainly incorrect. A claim for injunctive relief under domestic law does not ordinarily threaten such friction. Nonetheless, the United States may appear in "any" court to protect the interests of the United States (28 U.S.C. 517), and may file a Statement of Interest or an *amicus curiae* brief to protect such interests. A court may also invite *amicus* participation by the United States. The United States has ample safeguards, in the civil context, to protect against international friction, if such friction arises.

Conclusion

The Petition should be granted, the judgment below should be vacated, and the case should be remanded to allow the Court of Appeals, in the first instance, to revisit its decision in light of *Pasquantino*. Alternatively, the Petition should be granted, and the case should be accorded plenary treatment.

Respectfully submitted,

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